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A PRACTICAL AND ELEMENTARY
ABRIDGMENT OF THE CASES

ARGUED AND DETERMINED

IN THE COURTS OF

KING'S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS:

AND OF

THE RULES OF COURT.

FROM THE RESTORATION IN 1660, TO MICHAELMAS TERM, 4 GEORGE IV.

WITH IMPORTANT MANUSCRIPT CASES,

ALPHABETICALLY, CHRONOLOGICALLY, AND SYSTEMATICALLY
ARRANGED AND TRANSLATED;

WITH COPIOUS NOTES AND REFERENCES TO

THE YEAR BOOKS, ANALOGOUS ADJUDICATIONS,
TEXT WRITERS, AND STATUTES,

SPECIFYING WHAT DECISIONS HAVE BEEN

AFFIRMED, RECOGNIZED, QUALIFIED, OR OVERRULED.

COMPRISING, UNDER THE SEVERAL TITLES,

A PRACTICAL TREATISE

ON THE DIFFERENT BRANCHES OF THE

COMMON LAW.

BY CHARLES PETERSDORFF, ESQ.

OF THE INNER TEMPLE.

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A
PRACTICAL ABRIDGMENT
OF THE
REPORTS OF CASES
ARGUED AND DETERMINED
IN THE COURTS OF
KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,
FROM THE RESTORATION IN 1660, TO MICHAELMAS TERM, 4 GEO. IV.

Banks, See tit. *River*.

Banns, See tit. *Marriage*.

Baptism, See tit. *Christening* ; *Misnomer* ; *Variance*.

Barbadoes, See titles. *Bills of Exchange and Promissory Notes* ; *Colonies* ; *Insurance*.

Barbers' Company, See tit. *Physician* ; *Surgeon*.

1. *SHARPE V. LAW*. M. T. 1767. K. B. 4 Burr. 2133.

Upon a case reserved, the Court were of opinion, that the 32 Hen. 8. c. 42 by which the barbers and surgeons of London were incorporated, continued in force, notwithstanding the 18 Geo. 2. c. 15. which separates the barbers from the surgeons, and that the latter statute was only intended to dissolve the union between the two companies.

2. *REX V. CHAFFLE*. M. T. 1811. K. B. N. P. 3 Campb. 91.

The defendant, a trunk-maker, and member of the barbers' company, in the city of London, being appointed constable, and having refused to execute the office on the ground that he, as a member of the company, was exempt, was indicted for such refusal; against the tenability of which it was contended, under the 3 Hen. 8. c. 11; 5 Hen. 8. c. 6; and 32 Hen. 8. c. 42; that although the privilege only formerly extended to the surgeons' company, yet, upon the two companies being incorporated, the members of the barbers' company were entitled to the same exemption. *Sed per Lord Ellenborough, C. J.* The privilege only applies to approved and examined surgeons, and not to persons of this description. See *Rex. v. Pond*, 1 Com. 312; *Gremaire v. Le Clerc*. Poir. Valon 2 Campb. 144; and see *Rastall*. 463; 6 pl. 4; *Rob. Ent.* 414; *Ast. Pl.* 81.

Barge, See tit. *River*.

HARMOND V. PEARSON. M. T. 1808. K. B. N. P. 1 Campb. 515.

Action against the owner of a sunk lighter, for omitting to place a buoy over the same in the river Thames, by reason whereof the plaintiff's barge struck against the wreck, and was much injured. The evidence proved, that although no buoy was stationed over the spot, yet that the defendant, before it could be erected, placed a watchman to inform the bargemen of their danger, and that as soon as the plaintiff's barge approached the wreck, the watchman told the people on board to keep off, but they, instead of being influenced by this information, suffered the barge to come in contact with the wreck.

Per Lord Ellenborough, C. J. This action may be maintained, since it is a settled rule of law, that if any vessel be sunk in a navigable river, it is an imperative and bounden duty on the owner instantly to erect a buoy; and if he neglects so to do, he is answerable for the consequences. Here he placed a watchman, who made a verbal communication of the fact. Who can say that they understood its purport? Nothing could be so easily misunderstood.—Verdict for plaintiff.

pointed out the danger to the bargeman.

The 18 Geo 2 dissolving the Barbers' and Surgeon's Company, does not repeal the 32 Hen. 8. A member of the Barbers company in London, not an approved surgeon under the 32 Hen. 8. cannot claim to be exempt from serving the office of constable.

An action will lie against the owner of a sunk lighter in the Thames, who has omitted to place a buoy over the spot, for damage done to a barge by striking against it, though a watchman placed near the spot,

In an action of trespass for unmooring a barge, the defendant cannot, under the general issue, show an authority from the plaintiff.

2. MILMAN V. DOLWELL. H. T. 1810. K. B. N. P. 2 Camp. 378.

In trespass for unmooring a barge, the plaintiff proved that he had two barges on the river Thames; that they were moored in the middle of the river, and that the defendant unmoored them, after which plaintiff discovered a hole in the bottom of one of them. There was no evidence to show how this injury had been occasioned. For the defendant it was proposed to prove, that there being a great quantity of ice in the river, and the plaintiff's barges in great danger, the defendant, for their preservation, unmoored them, which, it was argued, it must be presumed he was entitled to do, the plaintiff having placed the barges under his general management and control. But, *Per Lord Ellenborough, C. J.* I am of opinion that this evidence cannot be received under the plea of not guilty. He should have availed himself of this fact by a special plea. The only question to be decided here is, whether the defendant unmoored the barge or not; and not, whether he was justified in removing the barges from a place of danger. See post, tit. Trespass.

3. SPITTY V. POWERS. E. T. 1791. K. P. N. P. 1 Peake. 53.

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In an action for sinking the plaintiff's goods in a barge, the owner of the barge is a compe-

Case for not placing a buoy over the wreck of defendant's barge, whereby A. B's barge, laden with the plaintiff's corn, was sunk, and the corn spoiled. A. B., the owner of the vessel, being released by the plaintiff, was called to prove the circumstances. It was objected, that if the defendant was liable to the plaintiff for the corn, he was answerable to A. B. for the damage done to the barge, and that the record of recovery in this action would be evidence against the defendant in one brought by A. B. But, *Lord Kenyon, C. J.* entertaining a different opinion, admitted his testimony.

tent witness upon having a release, notwithstanding the injury he may have also sustained.

4. TERRY V. BARKER. T. T. 1817. K. B. N. Stark. 172.

A barge man who carries malt in his own sacks between vendee and vendor, may sue the former on his undertaking to return

The defendant purchased malt of one A. B. who employed the plaintiff, a bargeman, to convey the same to the defendant. The plaintiff furnished sacks in order to deliver the malt to the defendant. Upon its delivery the defendant requested that the sacks might be left in his possession with the malt, undertaking to return them within a reasonable time. In an action for not having returned the sacks within a reasonable time. *Lord Ellenborough, C. J.* was of opinion, that the action might be sustained, notwithstanding it was contended that there was not a sufficient privity of contract between the parties; for the defendant, by agreeing to return the sacks, undertook to return them to the owner, who was properly the plaintiff. The question was left to the jury, and they found a verdict for plaintiff.

them within a reasonable time.

Bark.*

STEPHANI V. BURROW. M. T. 1794. Ex 2 Anstr. 346.

The 27 Geo. 3. c. 18 does not extend to bark imported in the rough state; and pulverised here, and there

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fore no drawback will be allowed on such bark on exportation.

In an action against the defendant as under-searcher of the customs, for refusing to sign a debenture to entitle the plaintiff to the drawback on a quantity of Peruvian bark, which he was then exporting, the plaintiff had a verdict, subject to the opinion of the Court on these facts: that the bark had been imported and duly paid upon it in the rough state, that it had been pulverised by the plaintiff and was about to be exported. The question was, whether by this change it ceased to be entitled to the drawback. It was proved that bark was better pulverised in England than any where else. In the manufacture, the

* The 45 Geo. 3. c. 66. s. 1. after reciting the 4th section of the 6 Geo. 3. c. 48. and also the 9 Geo. 3. c. 41. s. 8; and that great depredations had been committed in his Majesty's woods and chases, upon bark, enacts, that the above clauses in the said recited acts, and all and every the penalties, forfeitures, and punishments thereby inflicted, and all other provisions, matters, and things relating thereto, shall extend and shall be applied and put into execution, in relation to all woods and wood grounds, belonging to his majesty in Great Britain; as well in right of his duchy of Lancaster, as otherwise, and whether such woods or wood-grounds shall be within any of his majesty's forests, or chases, or not, and also to all and every persons and person who shall without legal right or authority, by night or day, take, carry, or convey away, any bark, being in any forests, or chases, or woods, or wood-grounds, belonging to his majesty, as well in his right of the duchy of Lancaster or otherwise, or within the woods or wood-grounds of any of his majesty's subjects in Great Britain, or who shall have in his, her, or their custody or possession, any bark, and shall not give a satisfactory account how he, she, or they came by the same, and shall be thereof convicted before any one or more justices of the peace, in manner prescribed and directed by the said recited act. See post, tit. Trees.

first process is to separate the bad particles from the good, by cutting off the former. In the course of the manufacture, about one-fifth of the quantity is lost or thrown aside in bark of ordinary quality; in bad bark, a greater proportion. In pulverised bark other materials may be added, in a small quantity without detection; but if there is great adulteration, it will be perceived by the officers of the customs conversant in that article. Formerly a very small quantity of bark was exported in powder, and the commissioners of the customs then allowed the drawback upon it; but lately the quantity exported had been greater, and the commissioners refused to allow the drawback; it was always exported under the general term bark, and the commissioners never would allow a certificate in which the words powdered bark were introduced.

It was contended, that the pulverised and rough bark ought to be considered in the same light; and that the 27 Geo. 3. c. 13. extended the drawback to it in that shape. But the Court were of opinion that the plaintiff was not entitled to any drawback; they said it is true that the particles of the commodity are the same as that which was imported, and which is found in the case to have paid the accustomed duty; but it appears, upon considering this act, that where the particles constituting the commodity have changed their shape and appearance, between the times of importation and exportation, the legislature did not intend to allow the drawback, because of the many frauds which otherwise could be practiced without a possibility of detection; accordingly, in many other commodities, the particles, which continue in every other respect the same, are considered by the legislature, after being manufactured, to constitute a different article. By a clause in the act, section 3, the real state of the commodity must appear by the entry, for the drawback is not allowed unless the goods are duly entered for exportation. The solicitude of the legislature respecting this rule shows, that they intended that the drawback should not be allowed unless the entry for exportation, and that upon importation, were the same; or, in other words, unless the article remained unaltered. In this case, indeed, it is found, that the bark remained pure and unmixed; but we must give such a decision as may stand as a general rule of construction of this statute, and such as may prevent any attempts to defraud the revenue and defeat the purposes of the act. It is found that powdered bark may be adulterated without danger of discovery, except from persons conversant with the commodity; the saw-dust of mahogany may be mixed with it for the purposes of fraud, and so the public may be forced to give a drawback upon a thing of no value.—Judgment for defendant.

Barley. See tit. *Tithes*.

Barn. See tit. *Covenant*.

Bar of Cower. See tit. *Dower*.

Bir, Pleas in. See tit. *Pleas and particular Tithes*.

Baron Court. See tit. *Court Baron*.

Baronet and Baron. See tit. *Dignity; Peerage*.

Bargain and Sale

Bankrupt. *ante*, vol. iii. p. 631. 631. Covenant. Deed. Feoffment. Fraudulent conveyance. Gift. Lease and Release. Set-off. Stoppage in Transitu. Uses and Trusts. Vendor and Purchaser.

(A) DEFINITION, ORIGIN, AND GENERAL NATURE OF, p. 5.

(B) WHAT MAY BE CONVEYED BY, p. 6.

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(A) DEFINITION, ORIGIN, AND GENERAL NATURE OF.

A bargain and sale is a contract for the transfer of personal effects, lands or tenements, and creates a covenant or agreement, when executory, upon which an action of covenant, debt, or *assumpsit*, is sustainable, according to the fact whether the instrument be or be not under seal.

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BARGAIN AND SALE.—Who may be conveyed by.

With respect to the conveyance of personal chattels, the term is seldom applied; but as it concerns real property, a bargain and sale is defined to be a real contract founded upon a valuable consideration, for passing of lands, tenements, and hereditaments, by deed indented and enrolled; 2 Inst. 672.

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This species of conveyance was known, long anterior to the statute of uses; Plowd. 303; 8 Rep; 24. n.; it being before that time a common practice for a person seised of lands to bargain and sell to another, in which case, if the consideration was sufficient to raise a use, the bargainor became immediately seised to the use of the bargainee; and now the stat. 27 H. 8. c. 10. immediately transfers the legal estate and possession to the bargainee; it enacts that "where any person stands or is seised of or in any honours, &c. lands, tenements, rents, services, &c. to the use, confidence, or trust of any other person or body politic, by reason of any bargain, sale, feoffment, &c. such person, &c. that has any such use, shall be deemed and adjudged in lawful seisin, estate, and possession thereof, to all intents and purposes, of or in such like estates as he has in the use, &c. and the estate, right, and possession of him so seised to any use, etc. shall be deemed and adjudged in him who has the use, etc. after such quality, manner, etc. as he had before in or to the use," etc.

The proper and technical words to be used in this mode of transfer are bargain and sale; but any other words that would have been sufficient to raise a use upon a valuable consideration before the statute of Henry, are now adequate to constitute a good bargain and sale; 2 Inst. 671; Grey v. Edwards, 4 Leon. 110; Fox's case, 8 Rep. 93-4; 2 Roll. Abr. 787. pl. 5; Anon. 3 Leon. 16.

(B) WHAT MAY BE CONVEYED BY.

A bargain and sale may be in fee for life, or for years, and may be adopted as a mode of conveyance by every person seised in fee-simple, fee-tail, or for life; and it has even been holden that a reversion expectant on a freehold estate may be conveyed by bargain and sale; Fox's case, 8 Rep. 93. and it is clear that a rent *in esse*, or an advowson, tithes, right of common, or any other incorporeal hereditament in actual existence at the time, may be thus transferred; Cro. Jac. 189.

(C) WHO MAY CONVEY BY.

As a bargain and sale only passes a use, and as all private persons are capable of being seised to a use, they may convey their estates by bargain and sale; but as there must be a person seised to a use, and a use *in esse* before the statute can have any operation, it follows that neither the king nor a queen *regnant*, nor a corporation, can convey their lands in this manner.

See 3 Leon. 175; 1 Rep. 1270.

(D) CONSIDERATION REQUISITE.

1. CROSSING v. SCUDAMORE. T. T. 1669. K. B. Vent. 137.

In trespass, the defendant pleaded that the where, etc. was the freehold T. H. and that by his command he entered. The plaintiff traversed the allegation, in the plea that it was the freehold of T. H. On the trial, a special verdict was found, which stated that N. H. was seised in fee, and that on, etc. he made a deed to J. H. enrolled within six months, by which the said N. H. did

Where no pecuniary consideration is given, the deed cannot operate as a bargain and sale.*

* For a bargain and sale being a conveyance of a use, and as a use cannot be raised without a consideration, (see *post*, tit. Uses and Trusts,) it follows that no bargain and sale can be good without a pecuniary equivalent, for the very name of the assurance imports a *quid pro quo*; 1 Rep. 176. n; Moore. 569. It is not, however, absolutely necessary that a consideration should be mentioned in the deed, for an avowment of a consideration may be made in pleading; Moor. 569; 2 Roll. Ab. 786. Hence, if a person, in consideration of a certain sum of money, bargains and sells, this is a good consideration to raise a use without an avowment of any specific sum, for the amount is not material, as any sum however small, is a sufficient consideration; 1 Rep. 24. n; 10 id. 24. n; 2 Inst. 672. But where no pecuniary consideration whatever is given, the deed will be void as a bargain, and sale, and no use will arise to the bargainee; Wood v. Lambert, Cro. Eliz. 394; Osborn v. Bradshaws Cro. Jac. 127 *et supra*: therefore, a use will not arise upon a conveyance to a person upon trust, to pay the debts of the grantor out of the lands conveyed; Lord Paget's case, 1 Leon. 194.

(For and in consideration of natural love, augmentation of her portion, and preferment of her in marriage, and other good and valuable considerations: give, grant, bargain, sell, alien, entail, and confirm unto the said J. H. and his heirs. The jury found that there was a covenant that the said J. H. should, after due execution, etc. quietly enjoy, etc.; and also a special cause of warranty; and that the deed was enrolled within six months, and that there was no other consideration for making the indenture than what was expressed; and if it were sufficient to convey the premises to the said J. H. they found for the plaintiff; if not, for the defendant. It was admitted in argument that the deed could not take effect as a bargain and sale, no money being paid.

2. *BARKER V. KEATE*. T. T. 1676. C. P. 1 Mod. 262; S. C. 2 id. 259; S. C. 1 Freem. 219.

In an action of ejectment, a special verdict was found that E. H. was seised to him and the heirs males of his body: that E. H. by indenture between himself and T. P. demised to T. P. from the feast of St. Michael then last past for six months, rendering a pepper-corn rent, and that afterwards by another indenture between himself on the one part, and T. P. and E. B. on the other part, reciting the said lease, he bargained and sold the reversion to T. P. his heirs and assigns, to the intent to make him tenant to the *præcipe*, in order to the suering of a common recovery, in which E. B. was to be the recoverer, and himself, the said E. H. the vouchee, and that this recovery was to be to the use of E. H. and his heirs, etc. And if the Court should adjudge that in this recovery there were a good tenant to the *præcipe*, they found for the plaintiff; otherwise, for the defendant. For the defendant it was argued, that there was no good tenant to the *præcipe*, for that T. P. never was in possession, by virtue of the lease, for six months. No entry is found, nor no consideration to raise an use. All the consideration mentioned is the reservation of a pepper-corn, which is not sufficient, for it is to be paid out of the profits of the land. It was compared to *Colver's case*, 6 Co. 16; *Cro. Eliz.* 378; where a sum in gross appointed to be paid by the devisee, gave him an estate in fee-simple; but a sum to be paid out of the profits of the land, *Lord Pagett's case*, 2 Rol. Abr. 784; *Moor.* 193; and the case of the *Abbot ofbury v. Bokenham*, *Dyer* p. 8. pl. 31. was cited. Besides, the consideration in this case is a thing of no value, being but a single pepper-corn. If an infant make a lease for years, rendering rent, the lease is but voidable; but if an infant make a lease for years, rendering a rose or a pepper-corn, or any such like trifle, the lease is void; and *Fitzherbert*, tit. "Entry, Con-geable" 26, was cited as well as *Sutton's Hospital*, 10 Co. 34. where it was holden that the reservation of 12s. was a sufficient consideration to vest a use in the hospital.

The Court, after taking time to consider, said, they had examined the precedent in the case last quoted, and that there the reservation of a rent was mentioned in the deed as a consideration to raise a use, which might perhaps make a difference between this case and the one then under consideration.*

(E) EFFECT OF.

1. *CHALLONER V. DAVIES*. M. T. 1697. C. P. 1 Lord Raym. 400; S. C. Lutw. 559.

The plaintiff declared that the plaintiff covenanted with the defendant, that the plaintiff, and all other persons having an estate under him, should make sufficient conveyance of certain land to the defendant and his heirs before the 17th of November next following; and that the defendant covenanted, that upon such conveyance made to him, he would pay to the plaintiff or his assigns, at the house of Sir Francis Child, London, 300*l.* and that they mutually bound themselves, &c. in the penalty of 100*l.* to the performance of the said agree-

* In the M. T. following, the unanimous opinion of the whole court was, that the word "grant" was sufficient to pass the land by way of use; that the reservation of a pepper-corn was a sufficient consideration to raise a use to support a common recovery; and that the lease being within the 27 Hen. 8, c. 10. there was no necessity for an actual entry to make the lessee capable of executing a release; for being in possession; and so a good tenant to the *præcipe*, and judgment was given accordingly; S. C. 2 Mod. 253; see also 3 Mod. 310; *Sanders on Uses and Trusts*, 443. 452. 469. and the 14 Geo. 2. c. 20.

But if a conveyance be made without such consideration, by the words "*demise, and grant,*" with the reservation of a pepper-corn for the purpose of receiving a release of the inheritance, the consideration of a pepper-corn is good to raise a use in the grantee, and make lands pass by way of bargain and sale.

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A bargain and sale by tenant for years, conveys no possession without actual entry, but if it be made by such tenant and the reversioner, it operates as a surrender by the to

nant, and the bargain and sale of the reversion, yet the Court cannot take notice, that it has such operation until it is either pleaded according thereto, or set out in answer thereto.

ment; and the plaintiff avers that he was ready to perform all on his part to be performed; and that he and one Markham, who had a lease for years under the plaintiff of the said lands, bargained and sold the said lands to the defendant for one half year, and that the plaintiff, by a release dated the day after, released to the defendant and his heirs, all his right, title, &c. of which lease and release the defendant had notice at A. in the county of Bucks, the 16th of the said November, and there refused to accept them, and refused to pay the money to the plaintiff *secundum formam* of the said covenant, etc. upon which declaration the defendant demurred.

In support of the demurrer it was argued, that the plaintiff had not averred that the lease and release were a sufficient conveyance. For the plaintiff it was contended, that the Court ought to judge whether the bargain, &c. by lease and release, be a good conveyance or not. The counsel admitted that if the lessee for years, and the reversioner join in a lease and release, this does not operate by the statute of uses, for the lease being the lease of the lessee, who has no seisin of the freehold in the land, but only a possession of it, is not within the statute of uses, and then no possession by such lease is transferred before an actual entry, upon which the release may operate; but no entry appears in this case. But though in the present case it is not good by bargain and sale by the statute of uses, yet the lessee and the reversioner joining together who have the whole interest and estate of the land in them, this will be a good conveyance to pass the estate. For the lease ought to operate, *ut res magis valeat*, etc. and then in this case the lease ought to be expounded the surrender of the lessee to the reversioner, and then the lease and release of the reversioner. Or otherwise it will be a grant of the reversion, and then the grant of the interest of the lessee for years. For the intent of the parties was, that both their interests should pass; and they have power to do it, and therefore it ought to be expounded a good grant to satisfy their intentions. If the reversioner makes a lease for years of his reversion, the lessee in possession, though he has a greater term than the lessee of the reversion has, yet he may surrender to the lessee in reversion; Co. Lit. 192 a; and nevertheless the term for years in possession, cannot merge in the term in reversion, but is merged in the inheritance; Hutt. 126. and Treport's case, 6 Co. 14. b. are authorities in point, that in this case it ought to operate as the grant of the reversioner, and the surrender of the lessee; for the word surrender is not absolutely necessary to make a surrender; 40 Assi. 16. For the intent of the parties is sufficient to make a deed operate as a surrender, without any formal words. But it cannot in this case operate as a surrender, yet since the lessee joins in the lease and release, it will be an extinguishment of his term; Cro. Eliz. 487; 10 Co. 46. b; Lampet's case, 2 Roll. 402. For a term of years being only a chattel interest, it will be easily extinguished. And though it was in this case designed by the parties that it should be a lease, and then a release to make the conveyance, yet the law in divers cases will make a transportation of estates, to satisfy the general intent of the parties, that it should not be frustrated; 1 Co. 76; Bredon's case, Cro. Eliz. 727. pl. 62. 792; Plowd. 172; W. Jones. 455; which ought to be done in this case, rather than it should be void. Treby, C. J. doubted whether the plaintiff should not have pleaded the conveyance according to its operation; but in this case having pleaded it as a bargain and sale, where it could not be a bargain and sale, the declaration was not good. But Powell, J. said, the question is, whether there is not sufficient in the declaration to show that the plaintiff has performed all on his part to entitle himself to his action, and therefore it may differ from the matter of a title pleaded. And in this case the termor has consented to pass his term, which will amount to a surrender; Dyer 110. b. Lessee for years released to the reversioner, and held a good surrender. Treby, C. J. doubted the case in Dyer. But if it be law, yet if the declaration in that case had been that the lessee released to the reversioner, where there was not any release, but a surrender, such a declaration had not been good, for he ought to have declared that he had surrendered. But if in

In this case the deed of conveyance had been shown in *hæc verba*, there the Court might have judged according to its operation. Put here the deed is not shown, but only it is said what is the effect, viz. that it is a bargain, etc. which it cannot be in this case. And if judgment be given for the plaintiff, it must be that the lessee for years bargained, which cannot be, etc. for there is nothing before the Court to make another construction.—Judgment for the defendant.

2. CARTER v. MADGWICK. M. T. 1692. C. P. 3 Lev. 339.

In ejectment upon not guilty pleaded, a special verdict was found, it appeared that P. seised in fee by indenture between him and S. B. his grandson, the lessor, in consideration of affection and 5s. bargained and sold to the lessor and his heirs the tenements in question; *habendum* immediately after his death to the lessor and the heirs of his body, with divers remainders over, which indenture was enrolled within six months, and P. the same day by another indenture also enrolled, upon the like consideration, granted, bargained, and sold to the lessor and his heirs other lands, *habendum* immediately after his death, to the lessor and the heirs male of his body, with divers other remainders over, after which the said P. enjoyed all the lands in both the indentures, his whole life without interruption, and died; afterwards, the mother of the lessor, being the daughter and heir of P. entered; upon whom the lessor entered, and made the lease to the plaintiff. *Per Cur.* Although the *habendum* of a future freehold is void, yet the grant in the premises being expressly to him and his heirs, the indenture shall enure upon the premises, and shall pass the estate to the vendee directly by the premises, and the continuance of the possession by the grantor for his whole life afterwards was tortious, and shall not alter the case although perhaps he thought and intended that nothing should pass till after his death, for his intent could not alter the law, and make a future freehold good, and a present freehold void.

Where there is an indenture of bargain and sale to J. B. and his heir, *habendum* to the bargainee in tail, after the death of the bargainor, the indenture shall inure upon the premises, and shall pass the estate to the vendee directly.

(F) FORM AND ENROLMENT OF.

Before the statute of uses, equitable estates of freehold might have been created through the medium of trusts, without livery of seisin,* and by the operation of that act legal estates of freehold may, of the present day, be created in the same manner. The framers, however, of the statute of uses, sagaciously foresaw that its provisions would render livery unnecessary to the passing of a freehold, and that the freehold of such things as do not lie in grant would become transferable by *parol* only without any solemnity whatever. To prevent the inconvenience which might arise from a mode of conveyance, so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted by the 27 Hen. 8. c. 16. that no manors, lands, tenements or other hereditaments, shall pass from one to another, whereby any estate of inheritance of freehold shall be made or take effect, or any use thereof to be made, by reason only of any bargain and sale, except by writing indented, sealed, and enrolled in one of the Courts of Westminster, or else within the county or counties where the lands, etc. so bargained and sold lie, before the *custos rotulorum* and two justices of peace, and the clerk of the peace of etc. or two of them, whereof the clerk of the peace be one, the same enrolment to be made within six months after the date of the same writing indented.

Provided this act shall not extend to any lands, etc. lying within any city, borough, etc. wherein the mayors, etc. or other officers have used to enrol any evidences, deeds, or other writings, within their precinct or limit.

The objects of these enactments evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness, and, lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment,

* This is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass; *per* Lord Mansfield, 1 Burr. 107. For the origin and history of the transfer of lands by livery of seisin, see 2 Bl. Com. 311; *Med. Form. Ang. Dissert.* 9; and *Spelm. Glossary*.

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for the more ancient one of livery. Put the latter part of this provision, which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the intervention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in the courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this insufficiency of the statute of enrolments are now in some measure prevented by the 23 Car. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them otherwise than by writing.

By the statute 5 Eliz. c. 26. bargains and sales of lands lying in the counties palatine of Lancaster, Chester, and the bishopric of Durham, are required to be enrolled in the respective courts of those counties. And by the statutes 5 Ann. c. 18; 6 Ann. c. 35; and 8 Geo. 2. c. 6; bargains and sales of lands lying within the west, east, and north ridings of the county of York, may be enrolled before the registers of those ridings, and shall be as good as if enrolled at Westminster. By the statute 10 Ann. c. 18. sect. 3. it is enacted that a copy of the enrolment of a bargain and sale, examined with the enrolment, signed by the proper officer, and proved upon oath to be a true copy, so examined and signed, shall be of the same force and effect as the indenture of bargain and sale would be, if the same was produced.

Lord Coke, 2 Inst. 672. in describing the effect and operation of the stat. 27 Hen. 8. c. 16. says, that as all bargains and sales are directed to be in writing, they must be by indenture written, not by print or stamp; and although the indenture may be either on parchment or paper, yet the enrolment must be on parchment, it being so required in the clause of enrolment by the clerk of the peace; and that the same requisite is implied where the enrolment is in any of the king's courts of record.

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The time prescribed by the statute for enrolment is six lunar months, to be computed from the day of the date of the deed, which is exclusive. If the deed has no date, then the time must be calculated from the delivery; 2 Inst. 674; 5 Rep. 1; Hob. 140; Dy. 218. The statute, we have before shown, only extends to estates of inheritance or freehold; a term of years need not therefore be enrolled. In consequence of the statute of enrolments, the freehold does not pass from the bargainor until the deed of bargain and sale is duly enrolled; but the enrolment has, for most purposes, a relation to the delivery of the deed; 2 Inst. 674; and thereby avoids all mesne incumbrances and conveyances made by the bargainor between the date or delivery, and the enrolment; Mullery v. Jennings, 2 Inst. 674; Flower v. Baldwin, Cro. Car. 217. Neither the death of the bargainor or bargainee before enrolment will prevent the passing of the estate. And where the bargainee dies before enrolment, his heir shall be in by descent; 2 Inst. 674; Dymock's case, Cro. Jac. 408; Hob. 136; and his wife shall have dower, in case the deed be afterwards enrolled; Cro. Car. 217; 2 Saund. 55. Ow. 70; 2 Hols. 39. The bargainee of a reversion shall have the rent incurred between the delivery and enrolment of the deed; Latch. 157; 1 Sid. 310; but if the rent be paid by the tenant to the bargainor, the payment is lawful, and the bargainor is not compellable at law to account for it; Ow. 150. 69; Dyer. 218; Godb. 156. So if a bargainee grant a rent before enrolment, it is a good grant, if the deed be afterwards enrolled; Cro. Car. 217. A bargainee before enrolment may be a good tenant to the *præcipe* for suffering a recovery; 2 Inst. 675; Ow. 70; and he may receive a release from a stranger; 2 Inst. 675; but it is said that if a bargain and sale be made to A. and B. and their heirs, and A. release to B. before enrolment, such release is inoperative; Shep. Touch. 227; but a release to the bargainor will in such case enure for the benefit of the bargainee; Mockett's case, Shep. Touch. 227. But if a bargainee before enrolment convey the estate by bargain and sale to another person, and then enrol the first deed, the second bargain and

sale is void, though it should afterwards be enrolled; Sir Robert Barker's case, Shep. Touch. 227; Bellingham v. Alsop, Cro. Jac. 52. 409; Perry v. Lowen, 1 Vent. 360; T. Jones. 169. So a lease made by a bargainee before enrolment is not valid; Cro. Car. 110; Carth. 173; 2 Saund. 56. Though the enrolment has relation to the delivery of the deed to avoid all mesne incumbrances and conveyances made by the bargainor, yet it does not divest any estate lawfully settled in the bargainee in the interim; Hynd's case, 4 Co. 71. a; therefore if a feoffment be made or fine levied by the bargainor to the bargainee before enrolment he shall take by the feoffment or fine, and not by the bargain and sale. But if, in a case of this kind, the bargainor incumbers the land between the execution of the bargain and sale, and the levying the fine, &c. then the enrolment shall have relation back for the avoiding such mesne incumbrances in favour of the bargainee; 2 Inst. 671. 672; Shep. Touch. 226; Northumberland's case, Moor. 337; Popham's case, 4 Leon. 4; Flower v. Buldwin, Cro. Car. 217; 4 Cru. Dig. 184.

(G) HOW PLEADED.*

1. STREAM v. SEYER. M. T. 1695. C. P. 1 Lord Raym. 111.

In replevin of a mare taken at B. the defendant makes consuance, that the place contained six acres, and that R. S. was seized thereof in fee and granted a rent charge out of the same to R. C. in fee; that R. L. the father died by which the rent descended to R. L. the son, and by indenture of bargain and sale between him of the first part, and E. M. of the second, bargained and sold the said rent to the said E. M. which indenture was enrolled within the six months; that E. M. died, whereby the rent descended to E. M. his son; that the rent was in arrear; and defendant, as servant to E. M. and by his command, took the mare as a distress, &c. The plaintiff pleaded in bar to the consuance, *non est factum* of R. S. On issue thereupon, and verdict for the defendant that it was the deed of R. S. On motion in arrest of judgment it was contended that defendant by his own consuance, that E. M. under whom he claims, had no title to the rent, by stating that R. L. *dedit ex concessit*, by deed of bargain and sale enrolled the rent to E. M. but he does not show any consideration, and without it could not be good by the statute. On demurrer.

Where a bargain and sale is pleaded, the consideration ought to be shown [13] but if it be not, the omission cannot be objected to after verdict.

Per Cur. This cannot be aided by the verdict, because the issue was taken upon the other deed of R. S; if the plaintiff had taken issue upon the bargain and sale, and it had been found for the defendant, it would have been good after verdict, though no express consideration had been mentioned. In this case plaintiff has waived the benefit of taking an exception for not stating what sum, by taking issue upon the other deed; but if he had demurred it would have been fatal to the defendant, but after verdict it is good. And therefore defendant must have judgment *nisi*, &c. See 1 Vent. 108; 1 Lev. 308; T. Raym. 200.

2. SARGENT v. REED. E. T. 1744. K. B. 2 Stra. 1228.

In trespass for taking three bushels of barley the defendant pleaded that R. D. being possessed of the manor of P. of which the pier of Key was parcel, he

* In pleading a bargain and sale, the date of the instrument and parties should be correctly stated, and a profit made of the deed; (*vide* 8 T. R. 573; 1 Saund. 9. n. 1.) The enrolment should be averred, and an allegation that the grant was made for a pecuniary consideration introduced; Leon. 170; Moor. 504; but the omission of these averments is aided by verdict; 1 Leon. 308; but fatal on demurrer; 1 Vent. 109, 2 H. Bl. 259; 2 Stra. 1228; Wils. 91. *post.* 40. The operative words are, "did bargain and sell; and are so set out in pleading.

In stating the enrolment, the particular court must be distinctly shown. For where in debt upon a lease for years, the plaintiff declared that such a one by indenture did grant, bargain, and sell for money, the reversion to him in fee, which indenture was enrolled on such day according to the form of the stat. but did not show in what court it was enrolled; after verdict for the plaintiff, judgment was arrested; for the stat. 27 H. 8. c. 16. speaks of some special courts, and it is not reasonable to put the lessee to such infinite labour, as to search in all the courts, as well at Westminster as in the country, with the clerks of the peace; and the words *juxta formam statuti*, will not help it; Woolby v. Pirley, Yelv. 218; 8. C. Cro. Jac. 291.

See Precedents 2 Saund. 126; Ontnam v. Morewood, 3 East. 346; & Petersdorff's Index 48.

A bargain and sale pleaded without showing it to be for a valuable consideration, will be ill if demurred to, but is cured by verdict, [14] or by taking issue on a collateral fact.

Omitting to show the enrolment is fatal on demurrer.

and all those whose estate he had, at their own costs, had used and ought to repair it, and had of right, called bucklage, viz. three Winchester bushels of barley out of and for every ship's cargo of barley brought upon the said key to be exported in any ship; and that he by bargain and sale for the considerations therein mentioned, sold it to the corporation of P. to hold to them and their successors in fee farm for ever, by virtue of which they became, and yet are seized of the premises in their demesne as of fee; then he shows that the plaintiff brought upon the key a cargo of barley, consisting of 1200 Winchester bushels, out of which he as a servant of the corporation, and by their command, took three bushels, as by law he might. The plaintiff by his replication denies the prescription; and issue being joined, a verdict was given for the defendant. An exception was taken as to the manner of setting out the title of the corporation, the bargain and sale being only said to be for the considerations therein mentioned, when it ought to appear to have been made for money, or valuable consideration. *Per Cur.* We are of opinion that this way of pleading would be ill upon a demurrer, but it is now cured, as it is not a defective title, but a title defectively set out, the rule must be discharged. See 1 Salk. 365.

3. ANON. E. T. 1671 C. P. Carter. 221.

A rent charge by bargain and sale was pleaded, but it was not alleged that it was enrolled *secundum formam statuti*, nor that there was any attornment; but on demurrer it was said. *Per Cur.* This is clearly bad; and saying *virtute cuius* will not help the omission.

(H) HOW PROVED IN EVIDENCE.

By the stat. 10 Anne. c. 18. s. 3. it is enacted, that where in any pleading any indenture of bargain or sale enrolled shall be pleaded with a *profert in curia*, the person so pleading may produce a copy of the enrolment of such bargain and sale; and such copy examined and signed by the proper officer, and proved upon oath to be a true copy, shall be of the same force as the indenture of bargain and sale would be. See *post*, tit. Enrolment; and 1 Phil. Ev. 407. 3d edit.; 1 Stark. Ev. 366; Peake. Ev. 33. Evidence is admissible to show the real consideration paid in contradiction to that expressed in the conveyance; 3 T. R. 474; and *vide* 1 Leon. 170; Moor. 570; or in addition thereto, 7 B. P. C. 70.

Baron and Feme.*

1. OF THE PERSONS BETWEEN WHOM THE RELATIVE SITUATION OF HUSBAND AND WIFE MAY OR MAY NOT BE CREATED.

(A) WITH REFERENCE TO CANONICAL IMPEDIMENTS.

From consanguinity and affinity. From bodily imperfections or infirmities. From want of party's consent. See *post*, tit. Marriage.

(B) WITH REFERENCE TO CIVIL IMPEDIMENTS.

From an existing marriage. See *post*, tit. Polygamy. From lunacy, or mental incapacity. From want of parent's or guardian's consent. See *post*, tit. Marriage.

* This is the law term for "husband and wife," and has been retained in the abridgment as a phrase to which the profession are more accustomed, than the modern appellation of husband and wife.

As it is intended to discuss fully the numerous important topics connected with the marriage contract and its effect under title 'Marriage,' it is proposed to confine the present note to a brief inquiry into the first institution of the reciprocal engagements of husband and wife, without entering at all into any of the complex considerations which would necessarily arise from any attempt at a comprehensive investigation.

The mutuality, or union of mind and body consequent upon the creation of the relative situation of husband and wife, is founded in the law of nature, Instit. lib. 1. tit. 2; upon mutual consent; the essence of all civil contracts with a view to one undivided state or society for life; *nuptiæ sunt consortium omnis vitæ—eadem conditio, eadem fortuna*; Taylor's Elements of Civil Law.

In all communities which have obtained any degree of cultivation, marriage is deemed a civil contract, to be regulated by laws formed consistently with their particular ideas of policy or justice.

II. OF THE MODE IN WHICH THE RELATIVE SITUATION [15] OF HUSBAND AND WIFE MAY BE CREATED.

- (A) WITH REFERENCE TO THE CONTRACT TO MARRY; MODE OF ENFORCING IT; AND REMEDY FOR ITS NON-PERFORMANCE. See *tit. Marriage*.
- (B) WITH REFERENCE TO THE Banns. See *post. tit. Marriage*.
- (C) WITH REFERENCE TO THE LICENCE. See *post, tit. Marriage*.
- (D) WITH REFERENCE TO THE CONSENT NECESSARY TO THE MARRIAGE OF A MINOR. See *post, tit. Marriage*.
- (E) WITH REFERENCE TO THE FORM, AND TIME, AND PLACE OF THE SOLEMNIZATION OF MARRIAGE. See *post, tit. Marriage*.

III. OF SETTLEMENTS MADE ON THE WIFE PRIOR OR SUBSEQUENT TO THE RELATIVE SITUATION OF HUSBAND AND WIFE BEING CREATED. [16] See *post. tit. Jointure, Marriage Settlement*.

The necessity of refusing a legal recognition to any commerce between the sexes unanctioned by a marriage contract, has been admitted in all the systems of modern jurisprudence. It is this rule which first induced a disavowal in civilized countries of any intermediate state between marriage and concubinage. The former confers upon the female an equality with her husband in rank and importance, while the latter degrades her as the object of loose desire, and mere sensual gratification. In England, no middle condition between the honor of a wife and the infamy of a prostitute is tolerated.

In most states it appears that religious ceremonies were at an early period superadded to civil regulations. It was not, however, until the 24th session of the council of Trent, that the intervention of a priest or other ecclesiastical functionary was required. It was then ascertained that the existence of the marriage contract as a mere civil engagement, unhalloved by any sacred ceremony, tended much to the formation of clandestine connexions and its concomitant evils. The celebrated decree passed in that session interdicted any marriage otherwise than in the presence of a priest and at least two witnesses. But in England, until 1754, the common law continued to regulate the law of marriage: the authority of the council of Trent not having been there acknowledged; and whilst, in virtue of domestic institutions, a form was enjoined for the more solemn celebration of matrimony, and persons departing from those regulations were liable to ecclesiastical censure, still other and more private modes of contracting matrimony were tolerated and acknowledged by law; so that a contract *per verba de presenti*, that is to say, between persons entering into a present engagement to become husband and wife; or a *promise, per verba de futuro*, which was an agreement to become husband and wife at some future time, if the promise were followed by consummation, constituted marriage without the intervention of a priest; for the contract, *per verba de presenti*, was held to be a marriage complete in substance, but deficient in ceremony; and though the promise *per verba de futuro* of itself was incomplete in both points, yet the cohabitation of the parties, after exchanging the mutual promise, implied such a present consent at the time of the sexual intercourse, as to complete the marriage in substance, and give it equal validity with the contract *de presenti*, that is to say, the validity of an irregular marriage, which could not be annulled by the ecclesiastical court, though it might be censured for its informality; nor could the *vinculum* be affected by a subsequent regular marriage. At the same time, by the canon law, persons contracting irregular marriages, were subjected to certain inconveniences; for respecting presumptive rights arising out of such marriages, they had no remedy in the spiritual court, without first conforming to ecclesiastical regulations, being barred, unless able to show a title under the law which governs its decisions.

And such is still the Canon law of England, unless as controlled by statute; on which account it is enacted by the 27th section of the 4 Geo. 4. c. 76. (as it was by the late act of 26 Geo. 2. c. 23. s. 13.) "that in no case whatsoever shall any suit or proceedings be had in any ecclesiastical court," as might otherwise be had, "to compel a celebration of any marriage in *facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*; any law or usage to the contrary notwithstanding." The law of Scotland, as to the celebration of marriage, remains unaltered by the former or present marriage act, and is governed on that point by the principles of the ancient canon law. There the intervention of a priest is not necessary to constitute a marriage. The deliberate consent of parties entering into a present agreement to take each other for husband and wife, or a written acknowledgement of the parties that they were married at a certain time, or their solemn verbal acknowledgement to the same effect (although no proof be offered that a formal celebration had ever taken place,) is sufficient for the validity of the marriage contract, and is held to be binding on males of the age of fourteen, and females of twelve, without regard to domicile or external circumstance.

In Ireland, the law of marriage is similar to what prevailed in England prior to the marriage acts; and therefore, as marriages in this country were proveable by circumstantial evidence anterior to the passing of the statutes, it follows that they are still proveable in Ireland by the same species of evidence; *Steadman v. Powell*, 1 Addams. Rep. 65.

IV. OF THE EFFECT OF THE RELATIVE SITUATION OF HUSBAND AND WIFE BEING CREATED.

(A) OF THE INTEREST AND POWER ACQUIRED BY THE HUSBAND BY MARRIAGE.

1st. IN THE PERSON OF HIS WIFE.

(a) To have the custody of her person, p. 21. (b) To secure her from abduction, p. 26. (c) ——— adultery, p. 26. (d) ——— assault, p. 26. (e) ——— other injuries, p. 27.

2d. IN THE PROPERTY OF HIS WIFE.

(a) Rights of husband in his wife's real estate. See post, tit. Curtesy. (b) Rights of husband in his wife's copyhold estate. See tit. Copyhold. (c) Power of husband over wife's real estate.

1 To convey, p. 27. 2 — discontinue, p. 29. 3 — forfeit, p. 31. 4 — grant leases, p. 31. 5 — encumber, p. 32.

(d) Rights of husband in, and power over, his wife's chattels real, p. 33.

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(e) Rights of husband to, and power over his wife's *choses in action*. 1. Possessed by her in her own right, p. 40. 2. Possessed by her in *autre droit*, p. 41. (f) Rights of husband in, and power over her chattels personal. 1. Possessed by her in her own right, p. 40. 2. Possessed by her in *autre droit*, p. 41. (g) Rights of husband to have administration on his wife's death of her effects. See *ante*, vol. i. p. 234.

OF THE LIABILITIES TO WHICH THE HUSBAND IS RENDERED SUBJECT BY THE MARRIAGE.

1st. FOR ACTS BY THE WIFE BEFORE MARRIAGE.

(a) For her contracts p. 41. (b) For her torts, p. 43. (c) When liability for such acts terminate, p. 43.

2d. FOR ACTS OF THE WIFE DURING THE MARRIAGE.

(a) For necessities obtained by her during cohabitation, p. 44. (b) For necessities obtained by her after she has committed adultery, p. 48. (c.) For necessities supplied to her whilst the husband is abroad, or transported, p. 50. (d) For necessities supplied to children of the wife by a former marriage, p. 51. (e) For necessities obtained by her after a separation. 1. By mutual consent, p. 52. 2. — husband's ill-treatment, p. 56. 3. — voluntary departure of the wife, p. 59. 4. By imprisonment of the wife p. 59 (f) For necessities obtained by her after a divorce in the Ecclesiastical Court, p. 60. (g) On deeds executed by her, p. 60. (h) For torts committed by her, p. 60 (i) For crimes committed by her, p. 60. (j) For money paid by a third person for her funeral, p. 61.

3d. MODE OF ENFORCING THESE LIABILITIES. See *infra*, Actions by and against Husband and Wife.

(C) OF THE INTEREST AND POWER ACQUIRED BY THE WIFE BY HER MARRIAGE.

1st. IN THE PERSON OF HER HUSBAND.

(a) To enforce cohabitation, p. 62. (b) — protect him from injuries, p. 62.

2d. IN THE PROPERTY OF HER HUSBAND

Rights of wife in her husband's real estate. See tits. Dower; Jointure.

Rights of wife in her husband's copyhold estate. See tit. Copyhold; Freebench. (a) Rights of wife in her husband's chattels real, p. 62. (b) Rights of wife in her husband's chattels personal. 1. In general, p. 62. 2. Of her pin-money, p. 63. 3. Of her allowance for keeping house, &c. n. 63. 4. Of her paraphernalia, p. 64. 5. Of her share under the Statute of Distributions. See post, tit. Distributions, Statute of.

3d. IN THE MARRIAGE SETTLEMENT, OR EXPRESSED OR IMPLIED CONTRACT FOR ONE. See tit. Marriage Settlement.

(D) OF HER POWER OVER HER OWN OR SEPARATE PROPERTY.

(E) OF THE REMEDIES AGAINST THE HUSBAND FOR ACTUAL OR THREATENED VIOLENCE, p. 70. And see also tit. Divorce

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(F) OF HER REMEDY AGAINST A PERSON WHO HAS MARRIED THE FEME WHEN THE MARRIAGE IS VOID, p. 70.

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[21] IV. OF THE EFFECT OF THE RELATIVE SITUATION OF HUSBAND AND WIFE BEING CREATED.

(A) OF THE INTEREST AND POWER ACQUIRED BY THE HUSBAND BY THE MARRIAGE.

1st. IN THE PERSON OF HIS WIFE.*

(a) *To have the custody of her person.*

1. MANBY V. SCOTT. M. T. 1662. C. P. 1 ridg. 333.

Per Bridgman, C. J. "If a *supplicavit* lie for a husband imprisoning his wife, and restraining her liberty in the house; yet it is no imprisonment to allow her the liberty of the house, and restraining her from going out of it.—*Sid* vide *Lister's case*, post, 23.

The husband is in general entitled to the absolute controul over his wife's person.

* A series of ages have demonstrated that savages are the tyrants of the female sex, and that the condition of women is usually ameliorated by the refinements of civilized life.—In the early stages of society, females are generally subject to the uncontrolled power of man, and he may approve or censure, caress or chastise, and exercise the jurisdiction of life or death. Even now, in countries of the most refined and polished habits, a considerable latitude is allowed to marital coercion. In England the husband possesses the right of imposing such corporeal restraints as he may deem necessary for securing to himself the fulfilment of the obligations imposed on the wife by virtue of the marriage contract. He may, in the plenitude of his power, adopt every act of physical coercion which does not endanger the life or health of the wife, or render cohabitation unsafe. It is not therefore, in the ordinary domestic quarrels, that parties are entitled to the interference of courts of justice, for there may be much unhappiness in the married state; there may be unkind treatment, and even abusive language, without any real personal danger; hence what merely wounds the mental feelings is in few cases to be admitted as a ground for claiming judicial interference, unless accompanied with bodily injury, either actual or menaced.—Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high offences in the marriage state, but not that cruelty which the law can relieve.

Still less is it cruelty, where it wounds, not the natural feelings, but the acquired feelings arising from particular rank and situation; for courts have no scale of sensibilities by which they can gauge the quantum of injury, done and felt; and therefore, though courts will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. (See *Evans v. Evans*, 1 Haggard, 38.)

But when a series of unkind treatment is accompanied by words of menace, and when, from collateral evidence, there appears a reasonable apprehension that the menace may be carried into effect unless prevented; these circumstances present a case of a very different nature, and such as calls for the prompt interference of ecclesiastical jurisdiction; and if blows have been struck, the case becomes still more aggravated, and the injured party is entitled to the remedy afforded by sentence of separation.

But to entitle a wife to apply for the protection of a court, by reason of cruelty, it must not appear that she has herself been the cause of the sufferings she complains of: it must appear that her own conduct has been guarded and proper, otherwise a remedy for the violence of the husband may be in her own power, merely by a change in her temper and behaviour. At the same time a husband is not authorised to resent a wife's misconduct with intemperance, for the interference of a court may be resorted to with effect, when a wife's failings are resented with an inordinate and dangerous severity. But if the conduct of a wife appear totally incompatible with her duty, if it be violent and outrageous, if it justly provoke the indignation of the husband, and expose his person to danger, she must take the consequences of occasional violence on his part, which may be sometimes rendered absolutely necessary in the lawful defence of his person, such a wife must seek a remedy in the reform of her own manners and disposition; 2 Haggard. 159; see 1 id. 409; 2 Phil. Rep. 67. 111.

Lord Kaimes, in his Sketches, says, "Public government is in perfection when the sovereign commands with humanity, and the subjects are cordial in their obedience. Private government, in conjugal society, arrives still at greater perfection where husband and wife govern, and are governed reciprocally, with entire satisfaction to both. The man bears rule over his wife's person and conduct; she bears rule over his inclinations:—he governs by law; she by persuasion. See Rousseau, *Emilie*, Liv. 5.

From these observations a very natural question arises, why is the legal pre-eminence exclusively vested in the husband? The answer is plain and simple—that he being the stronger party of the two, policy requires that his dominion should be admitted by the

2 REX v. MEAD. E. T. 1758. K. B. 2 Kenyon. 279; S. C. 1 Burr. 542. S. [22]
P. ANNE GREGORY'S CASE. M. T. 1766; 4 Burr. 1991.

An *habeas corpus* had been obtained at the instance of J. W. to bring up the body of M. W., wife of the said J. W., and daughter of M. to whom the writ had been directed; and having brought M. W. into court, the return was, that her husband having used her (M. W.) very ill, in consideration of a great sum which she gave him out of her separate estate, consented to her living alone, and executed articles of separation, and covenanted, under a large penalty, never "to disturb her, or any person with whom she should live;" that she lived with her mother, at her own earnest desire, and that this writ of *habeas corpus* was taken out with a view of seizing her by force, or some other bad purpose. And the Court held, that this agreement amounted to a formal renunciation, by the husband, of his marital right to seize her, or force her to live with him; and they were also of opinion, that any attempt of the husband to seize her by force and violence would be a breach of the peace; and any attempt made by the husband to molest her in her present return from Westminster Hall, would be a contempt of the Court. And they further observed, that she might go where she pleased. See 2 Stra. 1202; 2 *Ld. Raym.* 1334; 2 *Stra.* 989; 3 *Atk.* 550; 1 *Blac.* 18; 1 *Vez.* 19; 1 *Ch. C.* 250; 4 *Burr.* 1991.

And he may seize her, or obtain a *habeas corpus* to recover possession of her person^a unless he has expressly abandoned his marital rights by executing a deed of separation.

3. LISTER'S CASE. M. T. 1722. K. B. 3 *Mod.* 22; S. C. 1 *Str.* 478. S. P. [23]
REX v. MEAD. E. T. 1758. K. B. 1 Burr. 542. S. P. LORD VANE'S CASE.
M. T. 1744. K. B. 13 *East.* 171. n.; S. C. 2 *Str.* 1202.

Captain Lister, after articles of separation between him and his wife, Lady Rawlinson, seized her by force, and carried her home, in order to compel her to live with him. She obtained a *habeas corpus*; and, after argument at the bar, it was agreed by the Court, that if a wife will make an undue use of her liberty, by squandering away her husband's effects, or going into bad company, it was lawful for her husband to lay her under restraint; but where that did

He then loses all control over her person.[†]

law; for in his hands the power allotted him at once supports itself without external interference; give but the legal authority to the wife, and every moment would produce a revolt on the part of the husband, only to be quelled by assistance from other sources.

Nor is this the only reason: it is always probable that the man, by his education and manner of life, has acquired more experience, more aptitude for business, and a greater depth of judgment than the woman. In both these respects there are sometimes exceptions: but the ordinary course of things must be kept in view by the law.

They who, from some ill-defined notion of justice or generosity, would extend to women an absolute equality, only hold out to them a dangerous snare. Let the law, by conferring equality on wives, once release them from that necessity of pleasing which is at present imposed upon them; and it would in fact, instead of strengthening, only subvert the empire they now enjoy. Man forgets his self-love, while secure of his prerogative, and derives enjoyment even from concession; substitute, for the relation in which he now stands, a jealousy of rival power, and the continually wounded pride of the stronger party would soon rouse up in him a dangerous antagonist for the weaker; he would regard rather what he had lost than what he retained, and would turn all his efforts to the forcible establishment of that prerogative which is now subdued by the dominion of female influence.—However, as it cannot be the object of sound legislation to reduce to a state of passive slavery that sex which, from its weakness and softness, stands most in need of legal protection; this necessary prerogative, we have seen, on the part of the man, is confined within due limits, for the transgression of which redress may always be obtained; see *Bingham on Infancy*, &c.

^a And upon the principle that the husband possesses an absolute control over the person of the wife, it has been received as clear law, that a man cannot be guilty of rape on his own wife, for the matrimonial consent cannot be retracted; 1 *Hale*. 629; but he may be criminal in aiding and abetting others in such a design; Lord Audley's case, 1 *Harg. St. Tr.* 888; and where a marriage is coercive and consummated by force, though the husband cannot be appealed of rape till it is dissolved, &c till then it is a marriage *de facto*; he will be liable afterwards to be indicted as if no ceremony had passed, though such a proceeding has seldom taken place, because the 3 *Hen. 7. c. 2.* prescribes, we have seen, a specific remedy; *ante*, vol. i. p. 80; 1 *Hale*. 629. 630.

[†] And if it be shown that he has ill-treated her, and she has sworn the peace against him, the Court, on her being brought up by *habeas corpus*, will not compel her to return into his custody; Ann Gregory's case, *supra*, 22; and a husband engaged in treasonable schemes, cannot oblige his wife to live with him; Manby v. Scott, *Bridgm. Rep.* 243.

The affidavit in support of a motion for a *habeas corpus*, to bring up the wife of the applicant, must state that the former is detained against her will.

An action on the case lies by the husband, for enticing away his wife;

[24]
Even against the parent of the wife.*

In these cases the wife's declarations are not evidence on either side. It is sufficient to state in the declaration that the defendant, unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c. she did continue absent, &c. whereby

not appear, he could not confine her as a prisoner, though even in his own house. And, because it appeared that they were parted by consent, and under articles to live separate, the Court ordered that she should have her liberty.

4. *THE KING v. WISEMAN*. T. T. 1805. K. B. 2 Smith. 617.

This was a motion on behalf of a husband for a *habeas corpus*, to bring up the body of A. B., his wife, the latter having previously exhibited articles of the peace against the husband. The affidavit of the husband stated, that he verily believed, if he had an opportunity of conversing with his wife, that he might induce her to return home. He had demanded that he might have access to her, but had been told that he should not be permitted to see her.—*Per Cur.* The affidavit does not state that she is kept against her will. Without a suggestion of restraint, we cannot grant the writ—Rule refused.

5. *WINSMORE v. GREENBACK*. T. T. 1745. C. P. Willes. 577.

In a special action on the case, the declaration stated, that plaintiff's wife unlawfully, and against his consent, went away from him, and continued apart from him a long time; and that, during her absence, a large estate, real and personal, being devised to her separate use, she thereupon was desirous of being reconciled, and cohabiting with plaintiff her husband; but that the defendant persuaded and enticed her to continue apart from the plaintiff, which she accordingly did until her death, whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune. After a verdict for the plaintiff, with 3000*l.* damages, on a motion in arrest of judgment, it was objected, that there was not any precedent for an action like the present; *Litt. s.* 208. and *1 Inst.* 81. b. were cited. But, *Per Cur.* The general rule stated in those authorities is not applicable to the present case, it would have been so if there had never been any special actions on the case before; but that form of action was introduced for this reason, that the law will never suffer an injury and a damage without a concomitant remedy, there must be new facts in every special action on the case.—Rule discharged. See *1 Sel. N. P.* 440.

6. *ANON.* T. T. 1668–9. K. B. 1 Vent. 37.

In case for taking and keeping the plaintiff's wife from him, after issue joined, a motion was made for the postponement of the trial, the facts being, that the wife was the daughter of the defendant, and taken from him by the plaintiff without his consent, and, as the plaintiff affirmed, married to him. It appeared, that this marriage was questioned in the spiritual court; therefore, the Court thought it reasonable that the trial should be stayed until the validity of the marriage was determined; but, upon being informed that the Court were ready to give sentence in favour of the legality of the marriage, the trial was ordered to proceed.

7. *WINSMORE v. GREENBANK*. T. T. 1745. C. P. Willes. 577; *S. C. Bul. N. P.* 78.

This was an action on the case for enticing away and detaining the plaintiff's wife. On a motion for a new trial, it was objected, that the judge at *Nisi Prius* had refused to receive the declarations of the wife in evidence, either on the one side or the other. But the Court held, that they had been properly rejected; see *Clifford v. Barton*, *1 Bing.* 199; *2 Stark. Ev.* 46; *ante*, vol. i. p. 297. A motion was then made in arrest of judgment, on the ground that the declaration was defective in several particulars:

* Or he may institute a suit in the spiritual court for the restoration of conjugal rights, or to enforce cohabitation. The duty of *matrimonial intercourse* cannot be compelled by courts, the matrimonial cohabitation may. Proceedings in cases of this description are called suits for the restitution of conjugal rights. The promoter, the complaining party, usually alleges that the person complained of has withdrawn from cohabitation without lawful cause; and unless this averment is negatived by evidence, the party against whom the charge of desertion has been exhibited, must return to cohabitation. To bar a suit for the restoration of conjugal rights, facts of cruelty or adultery may be counterpleaded as constituting lawful grounds for separation; and when so counterpleaded merely for the purpose of barring a suit, evidence less circumstantial than what is required to warrant a sentence of divorce in an original suit, is holden sufficient; *Mortimer v. Mortimer*, *2 Haggard. Rep.* 313–320.

1st. That "procuring, enticing, and persuading the wife, are not sufficient, if no ill consequences follow." the plaintiff lost the comfort and society of his wife, without setting forth the means, &c. used by the defendant.

2d. That alleging that the act was done unlawfully and unjustly are not sufficient; but the particular methods by which the defendant procured, &c. should be distinctly stated, otherwise it would be leaving a matter of law to the jury.

3d. That no notice or request is laid, which is necessary in the case of a continued absence, though it be not requisite if the defendant had at first persuaded her.

Per Willes C. J. As to the first objection, there is a consequence alleged; viz. that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, &c." Whether enticing goes so far or not I will not now need determine, because "procuring" is certainly persuading with effect." I need not cite any authority for this; because every one who understands the English language, knows that this is the common acceptation of that word.

[25]

2dly. It must, it is contended, be an unlawful procuring; and that brings me to the second objection. it is not necessary to set forth all the facts to show how it was unlawful,* that would make the pleadings intolerable. and would increase the length and expense unnecessarily. It was said, however, that at least it was necessary for the plaintiff to add, "by false insinuations." But it is not material whether they were true or false. If the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated; as *burglar, felon, proditor, devisavit vel non, demisit vel non* but the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance of a nuisance, by building a house that hangs over, or damages the house of his neighbour. that against the beginner an action may be brought without laying a request to remove the nuisance; but that against the continuer a request is necessary, for which Penruddock's case, 5 Co. 100. 101. was cited, and many others might have been quoted; the law is certainly so, and the reason of it is obvious. But that reason does not extend to the present case, because every moment that a wife continues absent from her husband, without his consent, it is a new tort; and every one who persuades her to do so, does a new injury, and cannot but know it to be so.

8. BERTHON v. CARTWRIGHT. T. T. 1796. N. P. 2 Esp. 480.

Case for seducing plaintiff's wife, &c. Plaintiff proved her elopement, and her reception by defendant. It appeared she had been compelled to leave her home in consequence of the plaintiff's ill-treatment, and that defendant had afforded her protection from motives of humanity. Lord Kenyon held that, under such circumstances, the action could not be maintained.—Plaintiff nonsuited.

But when a woman is compelled

9. PHILP v. SQUIRE. T. T. 1791. N. P. Peake. 82.

[26]

It appeared that the plaintiff's wife applied to the defendant (her relative,) and stated that her husband, the plaintiff, had ill-used her, and turned her out of doors, and therefore requested the defendant to allow her to reside with him, to which defendant consented. The plaintiff had served the defendant with a notice not to harbour his wife, which defendant had disregarded; in consequence of which, plaintiff brought the present action. There was no proof on the part of the defendant that the plaintiff had ill-treated his wife; but Lord Kenyon said, where a party receives a man's wife who represents herself to be ill-used, out of feelings of humanity, an action cannot be supported upon the presumption of criminal motives, or that the party knows she is not ill-treated; if it were so, no one would protect a man's wife. It is immaterial whether the representation is true or false. This case differs from that of harbouring an

by ill-treatment to leave her husband, any person may receive and protect her,

And it is sufficient for this purpose if the wife be present

* See Precedents, Peterhoff's Index, 51.

herself to be illtreated.†

apprentice, the action being in that case for loss of service.—Plaintiff nonsuited. See Y. B. 20 H. 7. 2 b; Y. B. 1. E. 4. 1 a; F. N. B. 51. R; Rex v. Wiseman, 2 Smith. 611-8; Winsmore v. Greenbank, *infra*.

(b) *To secure her from abduction.*

See *ante*, vol. i. p. 289.

(c) *To secure her from adultery.* See *ante*, vol. i. p. 289.

MANNING'S CASE. M. T. 1671. K. B. T. Raym. 212; S. C. 1 Vent. 158; 2 Keb. 829.

Manning was indicted for murder; upon not guilty pleaded, the jury found that the prisoner had discovered the person in the very act of committing adultery with his wife, and had, in consequence of that provocation, thrown a jointed stool at him and killed him. Resolved by the whole Court, that this was but manslaughter, and directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

See 4 Bl. Com. 191; 1 Hale. P. C. 485.

(d) *To secure her from assaults.*

A man may justify an assault and battery in defence of his wife; 2 Rol. Ab. 546. D. pl. 1; 1 Bro. Trespass' pl. 128; *ante*, vol. ii. p. 376; and upon the principle of self-preservation, the husband killing the assailant in the necessary defence of his wife is excused; the act of the husband assisting being construed in law as the act of the party herself; 1 Hale. 434; 4 Bl. Com. 186.

(e) *To secure her from other injuries.*

1. BAKER v. BOLTON and OTHERS. M. T. 1808. N. P. 1 Campb. 493.

Action for negligence against the defendants, as proprietors of a stage-coach on which the plaintiff and his wife were travelling, when it was overturned; in consequence of which the plaintiff was much bruised, and his wife so seriously injured that she died soon after. The declaration stated that "by means, &c. the plaintiff had lost & been deprived of the fellowship & assistance of his wife, &c. and from thence hitherto suffered great grief of mind." It appeared in evidence she conducted his business, and that they were much attached to each other. Lord Ellenborough observed to the jury, that they must take into consideration the bruises received by the plaintiff, the loss of his wife's society, and the distress of mind suffered on that account until the time of her dissolution; but at that period they must stop. See Noy's Rep. 18. *sed vide* 1 4 5; *id.* Roll. Abr. 557. pl. 21; 1 Keb. 847; 1 Salk. 12.

2. HUXLEY v. BERG. M. T. 1815. N. P. 1 Stark. 98.

Trespass for entering a dwelling-house and committing a battery: the plaintiff, in order to show the outrageous nature of the aggression committed by the defendant, but not in aggravation of damages, was permitted by Lord Ellenborough to prove that the wife of the plaintiff died shortly afterwards from the alarm occasioned by the violent demeanour of the defendant.

2d. IN THE PROPERTY OF HIS WIFE.

(c) *Power of husband over his wife's real estate.*§

1. *To convey.*

1. Doe, D. FREESTONE, v. PARRATT. T. T. 1794. 5. T. R. 652.

Ejectment for two messuages. The facts were turned into a special case, from which it appeared that the premises were copy-hold; that in October, 1742, T. O., then being a customary tenant, surrendered them to the use of Mary E., her heirs, and assigns, upon condition, that if T. O., his heirs, &c.

† And a private person may justify breaking and entering the house of another, and imprisoning his person, in order to prevent him committing murder on his wife; Hancock v. Baker, 2 B. & P. 260.

‡ But if the husband kill the adulterer deliberately and upon revenge, it would be murder. See *post*, tit. Murder.

§ By marriage, the husband and wife are as one person in law. Upon this union depend almost all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage. By that act the husband acquires a freehold interest during the joint lives of himself and wife in all such freehold property of inheritance as she was seized of at the time, or may become so during the coverture. See *post*; tit. Curtesy, Tenant by.

Where a man finds another in the act of adultery with his wife and kills him in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree.†

The husband may justify an assault in defence of his wife; or even killing the assailant.

[27]

In an action for negligence, whereby the plaintiff's wife was killed, he is not entitled to damages for the loss of her society, or for his mental suffering after the moment of her death.

should pay to her, her executors, &c. a named sum on, &c. the surrender should be void. The surrender was presented at the sworn court in October, 1742, and default having been made in the payment of the money, Mary E. came in upon proclamation, and was admitted tenant to hold her the said Mary E., her heirs, and assigns, for ever. Mary E. afterwards surrendered the premises to the use of her will, and devised the property to J. F. and L., his wife, and to their heirs, and assigns, for ever, and appointed J. F. her sole executor. In April, 1757, J. F. was admitted tenant to the premises, to hold to him in fee. He entered, and received the rents and profits till 1774, when he surrendered to J. R. in fee, who was admitted. J. F. died some years after this surrender, and in the year 1791, L., the lessor of the plaintiffs, was admitted as surviving devisee, under the will of Mary E., to hold to her in fee. The question was, whether L. was entitled to recover. For the defendant it was urged, that the husband was competent to convey his wife's, as well as his own interest, without the concurrence of the former. *Sed per Cur.* It has been settled for ages, that when the devise is to the husband and wife, they take by entireties, and not by moieties, and the husband alone cannot, by his own conveyance, without joining his wife, divest the estate of the wife. This is sufficient to warrant us, sitting in 7 court of law, on determining in favour of the present plaintiff.—Judgment for plaintiffs. See Co. Litt. 187; 2 Com. Dig. 556. tit. Baron and Feme, D 2; F. N. B. 446. writ of cui in vita; Shep. Touch. 203; Perk. s. 223; 2 Burr. 969; 2 Atk. 207; 1 P. Wms. 453.

2. *PURFOY v. ROGERS.* H. T. 1671. K. B. 2 Lev. 39.

Special verdict in an action of ejectment, feme tenant for life, remainder to her first son; she married, and before a son born, he, in reversion in fee, conveyed the inheritance to baron and feme; after she had issue a son, and died. *Per Cur.* Had the wife survived her husband, she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, he being not *in esse* when the contingency happened. For the baron and feme took by entireties. Co. Litt. sect. 673; and therefore the estate for life of the feme was merged before the contingency happened; and the possibility which the feme had of waiving the inheritance, and receiving her estate for life, will not preserve it. For contingent estates, if the particular estate that support them continue not *in esse* when the contingency happens, never can arise, be the determination thereof by surrender, merger, feoffment, or any other way; and judgment was given accordingly for the defendant.

2. *To discontinuance.*

Discontinuance, observes *Lord Chief Baron Gilbert*, began in the case o

† And this rule, as to husband and wife taking in entirety, prevails when a feoffment with warranty is made to a man and woman; who afterwards marry, and happen to be impleaded and vouch and recover in value; because at the time of recovery they were husband and wife, and unable to take in moieties. So also if livery of seisin was not made *secundum formam chartæ* until after the marriage; or in the case of a grant to them of a reversion, if attornment was not made before the solemnization of the marriage; Co. Litt. 187. b. But they may take in severalty by express limitation, as in the instance of a limitation to A. for life, then to the husband for life or in tail, with remainder to his wife for life or for years.

The husband by marriage obtains, in his wife's real estates only, a title to the rents and profits during the coverture, and the property remains entire to the wife after the death of the husband, or to her heirs if she dies before him, unless by the birth of a child he becomes tenant for life by the courtesy. The husband has, however, such an estate in right of his wife as will enable him to make a tenant to the *præcipe* for suffering a recovery, without her previously joining in a fine; Cruise on Recoveries, 38; Harg. Co. Litt. 325, 6 n. 2.

Of the freehold lands of which the husband and wife are seised in right of the wife, whether held in fee-simple, fee-tail, or for life, his alienation would be good as against himself, and to her the power to transfer the whole estate of his wife, subject only to the right of entry of the wife, or her heirs; *post.* And it seems that an estate conveyed by the husband alone will be voidable only, and not void, and that it will continue till defeated by the entry of the wife, or of her heirs; 1 Prest. Ab. 336; Bac. Ab. tit. Leases. To bind the wife there must, as to lands of freehold tenure, be a fine or recovery by her, except as to leases under the stat. 32 Hen. 8. c. 28; or as to some special customs which obtain in London, Norwich, &c., or as to surrender of leases of the wife, for the purpose of renewal under the stat. 29 Geo. 3. c. 81.

But in trespass her death may be shown as evidence of the violent nature of the assault, but not in aggravation of damages.

As under a devise of husband and wife, [28] they take by entireties and not in moieties, the husband alone cannot by his own conveyance divest the wife's estate or interest, and if she survive him she will be entitled to the whole.

And the law is the same whether the property be in possession, remainder or reversion. [29]

husbands' alienations of their wives' land. By the civil law, the father gave the *dos* which was the estate of the wife given on the marriage, and if it consisted of matter moveable, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life. If it consisted of things immoveable, the husband could not alien without the consent of his wife, by the Julian law. And by Justinian's reformation, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominum civile penes maritum est, naturale penes uxorem; Dig. lib. 23. tit. 2. De jure dotium; ibid. tit. 5. De fundo dotali.* When the feudal law allowed the inheritance to descend to women, [30] (for woman, by reason of their incapacity to perform military service, were not originally admitted to succeed to proper fiefs, so that if the fief was in its original creation made descendible to females, it on that very account was styled an *improper* fief) then began the rights of the husband to be settled. And since all the feudal estates were reckoned civil rights, there was no room for the distinction of the civil law, which placed the civil right in the husband, as the head and governor of the family, and the natural right in the wife, the legitimate owner. The German and Northern nations were the strictest observers of the rules of marriage, tying only one man to one woman, and enjoying strict obedience to the husband, even before their receiving christianity, and much more so afterwards. Therefore, when the woman was allowed to succeed into the feud, if she took husband, she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest; hence, the husband had the right of possession, and the wife the right of property; in other words, the husband was seised in the right of his wife, or, more correctly speaking, the husband and wife were seised in the right of the wife, the seising being properly in both; see *Polyblank v. Hawkins*, Doug. 329. This distinction was before known in the feudal law; for every person that came in by descent, or by lawful alienation, by the ancient feudal law, had the right of possession; therefore, the husband being possessed of the wife's lands by the marriage contract, (for marriage, being originally with the approbation of the lord of the fee, was a direct acceptance of the husband as tenant; *Watk. Gilb. Ten.* 12. 108. 224. 289.) was supposed to have the right of possession; and by consequence the husband having aliened such right of possession, she was anciently driven to her writ of right; (5 Ed. 3. 58; 2 Inst. 343;) for the wife could not complain of disseisin done by the husband, because they were one in estate and interest, and the husband could not do her wrong; and it would be very absurd for the law to have allowed the wife to complain on the memory of her husband, as though he had been guilty of a violent disseisin; therefore, the ancient law gave her no possessory action, complaining of a violation of possession, but only allowed her to controvert the right; and the husband was the rather supposed to have the right of possession in him, for that being the superior and governing power, he might defend the possession by all actions; and therefore, if the husband lost by default in a possessory action, this put the wife to a writ of right; but when the writs of right grew so tedious, and the trial by battle grew out of repute, the law gave her a recovery by the writ of *cui in vita*, and to her heirs by the writ of *sur cui in vita*, *F. N. B.* 193; and now an actual entry is given to the wife and her heirs by the 32 H. 8. c. 28. which enacts, that "no fine, feoffment, or other act made, suffered, or done by the husband only, of any manors, &c. being the inheritance or freehold of his wife, during the coverture, shall make a discontinuance thereof, or shall be prejudicial to the wife or her heirs, or to such as shall have right, title, or interest to the same by the death of such wife; but that the wife or her heirs, and such other to whom such right shall appertain after her death, may enter into such manors, &c. according to their rights and titles therein; any fine, feoffment, or other act of the husband notwithstanding; fines levied by the husband and wife (whereunto the wife is party and privy) only excepted;" 2 Inst. 681; *Gilb. Ten.* 107. 110.

[31] Although the words of the stat. 32 H. 8. c. 28. are very general, and seem to give the wife and her heirs an entry, to avoid any fine levied by the husband

of her lands; yet, as appears, if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by his wife, her entry is not only taken away, but her right is for ever extinguished; 1 Co. Lit. 376. because the statute was intended to provide only against the discontinuance, which was a grievance particular to *femes covert*, but not to invalidate fines duly levied, according to the statutes 4 H. 7. c. 24. as to *femes covert*, because they by that statute have a remedy in common with others, which is by entry or claim to avoid the fine; whereas, before the statute of 32 H. 8. c. 28. it was not in their power to prevent the discontinuance, and therefore the statute relieves them in that particular. Besides, the words of the act are general, that such fine shall not be prejudicial to the wife or her heirs, yet the following words, viz. *but that she may lawfully enter, according to her right and title therein*, are explanatory, and allow her an entry only in cases where she had a right before the statute; and it is plain that by the 4 H. 7. c. 24. she had no right after the five years were lapsed from the death of the husband; Dyer. 72. 162. 191; Plowd. 373; 2 Inst. 681; 8 Co. 72; 9 Co. 140. As the wife may be barred by the husband's fine and non-claim, it follows that the statute 32 H. 8. c. 28. did not restrain the extent of the power of alienation by the husband, but merely changed the remedy from an action to an entry. Therefore, if the husband makes a feoffment of his wife's land, and dies, it operates as a discontinuance until avoided by the entry of the wife, or her heirs; and in the meantime, the estate of the wife will be in the alienation of the husband; and if the wife before entry, levies a fine, it will, operating by way of estoppel, establish the estate of the feoffee; see Moore's case, 2 Rol. Rep. 311; 3 Com. Dig. 439. A. 3; et vid. Weale v. Lower, Pollexf. 54; 1 Prest. Conv. 208; 1. Prest. Abstr. 335. 375; and Harris v. Evans, Eridge. Rep. 559.

3. *To forfeit.*

The treason of the husband will not occasion a forfeiture of the wife's real estate, but the wife will take the whole. Co. Lit. 187. a; but the king will be entitled to the receipt of the profits during the coverture; Co. Lit. 299.

4. *To grant leases.**

DOE, D. COLLINS, v. WELLER. H. T. 1798. K. B. 7 T. R. 478. In ejectment for a messuage, &c. it appeared that by a marriage settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will, attested by three witnesses, appoint, and for want of such appointment, reversion to herself in fee; during her husband's life she made a will in pursuance of the power, devising the estate to A, in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, but not pursuant to the power, and after her husband's death she received rent from the defendant; on behalf of whom it

Acceptance of rent by the wife after her husband's death, confirms a voidable lease.

* Where husband is seised of lands in right of his wife, we have seen, *ante*, p. 28. n. he becomes absolutely entitled to the rents and profits, though not to the freehold. By the common law, no lease of such lands could be made by the husband and wife to bind the issue. For a *feme covert*, as we shall hereafter see, can make no lease, and the husband could impart to the lessee no more than an interest determinable upon his death, (Bac. Ab. Leases; and see this point minutely discussed in 2 Wms. Saund. 180. n.) nor could the joinder of the wife secure the estate to the lessee after the husband's death, because the widow might then confirm or avoid the lease at her pleasure; 1 Rol. Abr. 349; C. P. 22; Doe, d. Collins, v. Weller, *supra*; though until she avoided it by her entry, the lease would remain good; Cro. Jac. 382; id. 417; id. 568.

But now the 32 H. 8. c. 28. (commonly called the enabling statute) empowers a husband seised of lands in fee, or in tail in right of his wife, or jointly with his wife, to make leases for 21 years, or for three lives, which will bind his wife and issue. In order, however, to render such leases valid, several things must be observed; the wife must be made party to any lease by a husband of the inheritance of his wife; such lease must be made by indenture in the name of the husband and wife, and sealed by the wife, the rent reserved to the husband and wife, and the heirs of the wife, according to her estate in the same, and must be the most accustomed rent paid for the same lands within 21 years next before the lease; the lease not to exceed 21 years, or three lives from the day of making; nor to commence till the expiration, or within one year thereof, of any former lease of the same land. Nor is the lease to be granted without impeachment, of waste. The statute does

- [32] was contended that a lease, by husband and wife, of the wife's lands, of which she was seised in fee, was only voidable by her after her husband's death, and that her receipt of rent afterwards was a confirmation of the lease, binding herself and all who claimed under her. *Pro rescit.* pl. 70; *Acceptance.* pl. 6; 2 *And.* 42; *Dy.* 159; *Wooton v. Hele*, 1 *Mod.* 291; *Goodright v. Straphon, infra*; 4 *Vin. Ab.* 101; was cited. And *per Cur.* The reversion in fee being in the wife at the time of the lease executed, makes an end of this question; for the lease being only voidable, her receipt of rent after her husband's death, confirmed it. See 1 *H. Bl.* 97. and post, tit. Lease.

5. *To incumber.*

GOODRIGHT V. STRAPHON. M. T. 1774. K. B. Cowp. 201.

If the wife
join with
her hus-
band in
charging
her estate,
[33]

A. in right of B. his wife, being seised in fee of the reversion of three houses expectant upon the life of the estate of C., they, A. and B. demised them by deed without fine to D. for 99 years, at a pepper-corn rent from C.'s death to secure a sum of money, and the equity of redemption was reserved to A. and B. A died, and afterwards B, allowed in account interest upon the mortgage, and surrendered one of the houses to the executors of the mortgagee, and di-

not extend to a grant of any reversion, nor to leases of land not most commonly letten for 20 years next before such lease.

It was always held necessary, as well before as since the 32 H. 8. c. 28. that a lease by husband and wife should be by *deed*; for if it be not, the lease is void, and cannot be affirmed by acceptance of rent by the wife after the husband's decease; and the reason is, because her assent is necessary at the commencement of the lease, and that can only be given by deed; *Dy.* 91. b. Still, however, if the lessee or any other *plead* a demise by husband and wife, it is not necessary to plead it to be by deed; 2 *Rep.* 61. b. And a lease by husband and wife of the wife's lands, not pursuant to the statute, is a good lease during the coverture, and may be pleaded as *their* lease; though it be without any reservation of rent, for the lease is not void, because the wife after her husband's death may affirm it by an action of waste or accepting fealty; *Hutt.* 102; or rent, *supra*: and where rent is reserved by acceptance of rent, or disagree, and avoid it by an ejectment or action of trespass; 3 *Rep.* 27. b. 28. n. If she accepts rent after her husband's death, she is liable to the covenants in the lease; and if a lease is made to a husband and wife by indenture, and she agrees after the husband's death, she is liable to all the covenants in the lease, except such collateral covenants (as the payment of a sum in gross, &c.) which charge the person and not the land; *Cro. Covenant.* 6. If the husband alone makes a lease for *life* of his wife's lands, it seems to be only voidable, and that the wife must *enter* after his death to avoid it; but if he alone makes an estate for *years*, it is absolutely void and determined by his death, and therefore cannot be affirmed by acceptance of rent after; 2 *Saund.* 181. a. The reason of this distinction is stated to be, because the lease for life commences by livery. However, unless the estate for life were granted by feoffment, it does not commence by a more ceremonious livery than a term for years under an indenture; so that the reason advanced, unless applied to a mere parol lease, fails. And in 3 *Bac. Ab.* 305. it is said to be clearly agreed in all the books, that if the husband *alone* makes a lease of his wife's lands for years by indenture, reserving rent, it is a good lease for the whole term, unless the wife by some act shows a dissent to it; and if she accepts rent which accrues after the husband's death, the lease is thereby become absolute and unavoidable. However, none of the authorities cited bear out this position; and the matter is, perhaps, still doubtful.

Husband and wife made a lease not pursuant to the statute, the lessee enters, and the husband, before any day of payment, dies; it was holden that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoidance to her husband, and his acceptance of the rent binds her; *Dy.* 159; *sed vide* *Co. Lit.* 246. The husband seised of copyhold lands in right of his wife in fee, makes a lease thereof for years, not warranted by the custom, which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; 2 *Rol. Rep.* 244; and the diversity seems between this act, which is at an end when the lease is expired, or defeated by the entry of the lord, or the wife after the husband's death, and such acts as a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non payment of rent, denial of suit or service, for such forfeitures as these binds the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit more than he can grant, which is but for his life.

If a widow who is a guardian in socage of her son marry again, and the husband join her in a lease of the infant's lands, such lease is void after the husband's death, for she had only an interest in right of the infant, and therefore could not be bound by her joining with her husband, as she would have been in the case of her own possession; *Plow.* 293; *Co. Lit.* 351; 1 *Rol. Abr.* 845.

rected one of the tenants to attorn and pay his rent to them. It was determined that by the act of surrender, and the directions to attorn and pay rent to the executors of the mortgagee, the lease was acknowledged by the wife as her own, and that the above circumstances amounted to a confirmation of it, and were equivalent to a re-delivery. *Sed vide Drybuller v. Bartholomew*, 2 P. Wms. 127.

even by mere deed, she will be bound by her confirmation of the charge after his death.*

(d) *Rights of husbands in, and power over, his wife's chattels real.*

As to leases for years or other chattel interests, of which the husband and wife are possessed in right of the latter; (except as to estates or interests settled by the husband, or by the husband and wife on their marriage, by way of provision for her, and whether such interest be legal, or as it should seem equitable) the husband alone may bind the interest of his wife by lease, assignment, or surrender; by reference to arbitration, and an award thereon; by forfeiture, by bankruptcy, or by judgment and execution against him; 1 Prest. Abst. 342. 343 And such assignment, &c. will bind the wife, though it be made without consideration; 3 P. Wms. 200. But the husband cannot dispose of his wife's chattels real by will, nor bind his wife's interest by a mere charge, as an annuity, &c. or by a judgment after execution; *ibid.*; but his contract to sell will be an equitable alienation; *Stead v. Cragh*, 9 Mod. 42. And if the wife should survive the husband, the term, so far it shall not have been aliened or forfeited by the husband, will remain with the wife; but if the

[34]

* But from the interest which the husband acquires by the marriage in the real estates of his wife, it follows that he singly cannot charge them at law with his debts during their joint lives; but if he were the survivor, and entitled to be tenant by the curtesy, then the incumbrances would continue during his life, at the conclusion of which they must necessarily terminate with his interest in the estate. But if she join with her husband in levying a fine of her estate to raise money to pay his debts, or otherwise to answer his engagements, the security will be good and obligatory upon her and her husband, and all persons claiming under them, for although the law protects the wife during the coverture so as to invalidate the alienation of her property by private conveyances unsupported by any particular custom, lest she might act imprudently, and against her inclination, under the influence of her husband, yet if, upon reflection and due consideration, she be anxious to dispose of her estate for her husband's benefit, and express her desire to do so upon a separate and private examination in a court of justice, and after proper information has been given to her of her rights, and of the effects of the act which she is about to execute, then, after such solemnities and safeguard, the law allows her to pass her estate either absolutely, or as a security for money as the case may be. A fine being attended with all these ceremonies; by it, therefore, she is permitted to convey her real estates, whether they be legal; 1 Roll. Abr. 347; or equitable interests; *Forrest*. 41; see post, tit. Fine.

By immemorial customs prevailing in particular places, a bargain and sale, &c. by the husband and wife, when she is examined according to such custom, will bind her, and those claiming under her, and be equivalent to a fine; 2 Inst. 673; and such conveyances are also protected by the 24th of Henry VIII. chap. 22. So also a surrender by husband and wife of copyholds when she is duly examined, will bind her and her heirs; *Dyer*, 363. b. But the husband must be a party, or consent to the surrender; unless the copyholds be settled to the wife's separate use, and then, according to *Compton v. Collinson*, 1 H. Bl. 334; her sole disposition of them will be valid. See post, tit. Copyhold; and 1 Watkins, 89. 4th edit.

Where a wife's estate is mortgaged for the benefit of her husband, she has, if she survives him, a right, after all his debts are paid, to stand as a creditor against his assets; *Tate v. Austin*, 1 P. Wms. 264; S. C. 2 Vern. 689; S. C. on appeal, 1 Bro. P. C. 1; and see *Parteiche v. Powlett*, 2 Atk. 384; *Inclendon v. Northcote*, 3 Atk. 436; and *Lewis v. Nangle*, Amb. 150; S. C. 1 Cox. 249; *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545; (unless at the time of the mortgage a settlement is made upon her; *Lewis v. Nangle*, Amb. 150;) but evidence is admissible to show that the wife intended otherwise. The title of the wife to be exonerated is considered as precisely the same with that of the heir; *Clinton v. Hooper*, 3 Bro. C. C. 201; S. C. 1 Ves. jun. 173. If the mortgage of the wife's estate is not for the husband's debts, or for debts due from the wife *dum sola*; *Lewis v. Nangle*, Amb. 150; his assets, though he join in the mortgage, are not primarily liable; *Bagot v. Oughton*, 1 P. Wms. 247; S. C. *Fortescue*, 332; Mod. Cas. 249. 381; and see *Clinton v. Hooper*, 3 Bro. C. C. 211; S. C. 1 Ves. jun. 188. And where the wife has the absolute disposal of the money, though she appropriates it to the use of her husband; *Clinton v. Hooper*, 3 Bro. Ch. Ca. 213. Where husband and wife mortgage the lands of the latter, and she dies, the equity of redemption survives to the husband, and not to her administrators; and if he dies, the wife shall have the benefit of the equity of redemption, and not the husband's executors; *Anon.* 3 Salk. 64.

husband should survive, it will, whether legal or equitable, remain with him *jure mariti*, and consequently without letters of administration to be obtained of her effects; *Alleyne* 15; 1 *Rol. Ab.* 345. 1. 40. It is observable, however, that if the wife have a possibility of a term, (*Wing. Max.* 213. pl. 13; 10 *Co.* 51. a; 9 *Mod.* 104.) which cannot by any means vest in the husband during coverture, the husband's release, or other disposition, will not affect her; but he and his wife together may bind this possibility by a *fine sur concessum*; 1 *Prest. Abst.* 343. Nor can he alone alien a term settled for the separate use of the wife, or a term which is settled on their marriage, as a provision for her, as distinguished from a settlement by a former husband; *Sir Edward Turner's case*, 1 *Vern.* 7.

In regard to the right of the husband's executors or his surviving wife to rents reserved upon underleases of her chattels real, and to the arrears of rent due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were reserved. Accordingly, if the husband alone grant an underlease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife so long as the sub-demise continued; the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death; 1 *Rol. Ab.* 344. 345; *Co. Lit.* 46. b; 2 *Lev.* 100; 3 *Keb.* 300.

And it would seem that the principle of the last case would entitle the executors, to the exclusion of surviving wife, to subsequent rents, and all arrears at the husband's death, though the wife was a party to the under lease, provided the rent were reserved to the husband only, because the effect of the sub-demise and reservation was an absolute disposition *pro tanto* as the wife's original term, which she could not avoid, and the rent was the sole and absolute property of the husband.

But if, in the last case, the rent had been reserved by the husband to himself and wife, then as their interests in the term granted, and the rent reserved, were joint and entire, it is conceived that the wife, upon surviving the husband, would be entitled to the future rents, and that she should be equally entitled to the arrears of rent at her husband's death; because, they remaining in action, and being due in respect to the joint interest of the husband and wife in the term, would with their principal, the term, survive to the wife; 4 *Vin. Ab. D.* a. 117.

[35]

With respect to the husband's liability to charges effecting his wife's terms for years, when he succeeds to them upon surviving her, the law may be considered to be thus settled.

That when the husband survives his wife, and upon that event becomes entitled to her terms for years, he succeeds to them subject to all the charges and equities with which they were affected in her possession; so that the wife, before marriage, subjected them to an annuity or other incumbrance, and her husband, either after her marriage, or after her death, renewed the leases, or surrendered the old and took new leases, the incumbrances in equity all attach upon such new leases, and the creditors will not be bound to contribute towards fines or expenses incurred in consequence of these transactions.

The power which the law gives the husband, to alien the whole interest of his wife in her chattels real, necessarily authorises him to dispose of it in part. If, therefore, the husband be possessed of a term for 40 years in right of his wife, or jointly with her demise it for 20 years, receiving rent, and dies, such demise or underlease will be good against her, although she survive him; but the residue of the original term will belong to her, as undisposed of by her husband. *Syms' case*, *Cro. Eliz.* 33; 1 *Rol. Ab.* 344. pl. 10; *Moor.* 395; 6 *Ves.* 389. So also if the husband alien the whole of the term of which he is possessed in right of his wife, upon condition that the grantee pay a sum of money to his executors, and then dies, and the condition is broken, upon which his executors enter on his lands, this alienation by the husband will be a sufficient disposition to bar the wife of her interest in the term, it having been whol-

ly disposed of by him during his life, and vested in the grantee; Co. Litt. 46. b. As the husband is empowered by express alienation of his wife's chattels real in possession to divest her property, and defeat her right by survivorship, as it before appears; so he may by other acts produce the same effect. Thus if the wife at the time of her marriage were a lessee for years, and her husband purchased or took a lease of the lands for both their lives, that act would amount to a disposition of the term, because, by the acceptance of the second lease, the term was surrendered by operation of law, which surrender the husband was enabled to make under his general authority to dispose of his wife's chattels real in possession; 2 Rol. Ab. 495. pl. 50. 70. a; and see 2 P. Wms. 1771; Roper. 175.

(c) *Right of husband to, and power over, his wife's choses in action.**

1. *Possessed by her in her own right.*

1. **BARLOW v. BISHOP.** E. T. 1801. K. B. 1 East. 432; S.C. 3 Esp. 266.

A. P. was a married woman carrying on trade in her own name with the consent of her husband. She became in the course of such dealing, indebted

* Property falling under this description are debts owing to the wife, arrears of rent, legacies, residuary personal estate, money in the funds, &c. Such choses in action do not vest in the husband by the mere operation of marriage; to entitle himself to them he must first reduce them into possession, and if either party dies before they are reduced into possession, they will not belong to the husband or his representatives, whether he should happen to survive his wife, or his wife should outlive him; but in the former case her personal representatives will be entitled to them at her death, and the husband must proceed for them if at all as her administrator. Rep. Talb. 173; and in case of the husband dying before his wife she will be absolutely entitled to them at his death: Co. Litt. 351. b. Com. Dig. Baron and Feme, E. 23. F. 2; 3 Mod. 186; F. N. B. 121; 3 P. Wms. 411. 2. The husband, however, is in all cases permitted, if he think proper, to reduce the choses in action of the wife into possession during the coverture, and to proceed at law, on any contract made with the wife *dum sola*. Choses in action may be released by the husband alone, and a payment to him will be a good discharge. Nor is it incumbent on the husband when he has a legal remedy for the debt to make any settlement or provision on the wife; but unless the money shall be released by the husband, or paid to him, or unless the right shall be changed as in the case of an award, ordering the money to be paid to the husband, or judgment recovered by him alone, the interest of the husband as husband will determine on his death, or on the death of his wife if she die in his life time; Phillis Kirk v. Pluckwell, 3 M. & S. 395; Day v. Pargrave, 3 id. 367; Wildman v. Wildman, 9 Ves. 174; Nash v. Nash, 2 Mod. Rep. 123. But with respect to the equitable right, this may be varied by contract. and therefore if the husband make a settlement on his wife in consideration of her fortune, the wife's fortune, though consisting of choses in action, and though there is no particular agreement for that purpose, is considered as purchased by him, and will go to his personal representatives; Cleland v. Cleland, Prec. Ch. 63; Blois v. Martin, 1 Vern. 501; Packer v. Wyndham, Prec. Ch. 412; 3 P. Wms. 199; Adams v. Cole, Cas. Temp. Talb. 168. But it seems that the husband does not by a settlement become a purchaser of the fortune, that may afterward come to his wife, if the settlement be expressed or imports to be in consideration of her fortune, as specified in the deed itself; Carr v. Taylor, 10 Ves. 579; *et vide* Salwey v. Salwey, Amb. 692; Garforth v. Bradley, Ves. 677; *secus* if it is, or purports to be, in consideration of the fortune, she is or may be entitled to; Mitford v. Mitford, 9 Ves. 95, 96. So also if the wife have a separate estate in choses in action, neither the husband nor any person claiming under him by assignment whether voluntary, (Jewson v. Moulson, 2 Atk. 420;) or for a valuable consideration; Macauley v. Phillips, 4 Ves. 19; Wright v. Rutter, 2 Ves. 711; Like v. Beresford, 3 id. 506; Wright v. Morley, 11 Ves. 17; nor by operation of law, as assignees under a commission of bankrupt; (Jacobson v. Williams, 2 P. Wms. 382; exparte Colygham, 1 Atk. 192; Grey v. Kentish, 1 Atk. 280; Warsal v. Mar, 1 Dick. 647; Freeman v. Parsley, 3 Ves. 424; Osmie v. Probert, 2 Ves. 680; Pringle v. Hodgson, 3 Ves. 617; Lamb v. Milnes, 5 Ves. 517; Mitford v. Mitford, 9 Ves. 87; Wright v. Morley, 11 Ves. 101;) can compel the payment of the wife's portion from trustees (except where there is an agreement before marriage, or where the husband is the purchaser of the wife's portion, (Brett v. Forcer, 3 Atk. 403;) without making a provision for her; nor does an inadequate provision for her by voluntary settlement after marriage vary the case; 2 Atk. 448. So a settlement before marriage of part of her property to her separate use does not bar her of this equity; Burdon v. Dean, 2 Ves. jun. 606. It seems doubtful whether children have any substantive and independent right to claim a settlement out of the choses in action of their mother, if a settlement was not directed during her life; see Murray v. Lord Elibank, 13 Ves. 7; but if there has been a decree for a settlement on the wife and children, and she does nothing to waive the equity, and she dies before the report, the children are entitled; Murray v. Lord Elibank, *supra*; S. C. 10 Ves. 84; Macauley v. Phillips, 4 Ves. 19, 20; Pocket v. Becket, 1 Dick. 843; Roe v. Jackson, 2 Dick. 604. So that if the husband dies after a proposal of a set-

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to the plaintiff, and to enable her to pay him, defendant who knew that she was married, gave her a note payable to her or order, for the amount of the debt; she endorsed it in her own name to the plaintiff, and he brought the present action. Lord Kenyon at the trial thought it not maintainable, and saved the point; and after a rule obtained for a nonsuit and cause shown, his lordship said it was clear that the delivery of the note to the wife, vested the property in the husband, that as he permitted her to trade on her own account and this was a tlement by him, the children would be entitled to have it carried into effect; *Anon.* 2 Ves. 672. But the Court will not, at the instance of a debtor, interpose an equity for the wife; *Glaister v. Hewer*, 8 Ves. 206; and whenever the husband can come at the estate of the wife without the aid of a court of equity, the court cannot interfere; *Attorney General v. Wherewood*, 1 Ves. 539; therefore if before a bill is filed, a trustee who has the wife's property, real or personal, chooses to pay the rents and profits of the real estate, or hand over the personal estate to the husband, (an improper act on his part, *Elibank v. Montolien*, 5 Ves. 743;) the husband has no remedy, but after a bill filed such trustee cannot exercise a discretion; *Macauley v. Phillips*, 4 Ves. 18; *Glaister v. Hewer*, supra; *Murray v. Lord Elibank*, 10 Ves. 90. So the husband may transfer bank stock belonging to his wife; and the court cannot interfere; *Wildman v. Wildman*, 9 Ves. 176; et vide *Pringle v. Pringle*, *Hodgson*, 3 Ves. 620. In these cases the wife has the option not to have any settlement made, but if a settlement is to be made it is always directed for the benefit of the wife and children: *Murray v. Lord Elibank*, 13 Ves. 67. She may upon examination apart from her husband and with full knowledge of her right, the same being ascertained; *Sterling v. Rochford*, 8 Ves. 164; *Woodlands v. Boucher*, 12 Ves. 178; *Edmonds v. Townsend*, 1 Ant. 98; waive a settlement; *Wright v. Rutter*, 2 Ves. 677; *Dummock v. Atkinson*, 3 Bro. C. C. 195; even in favor of a husband who is insolvent; *Willats v. Clay*, 2 Atk. 67; sed vide ex parte *Higham*, 2 Ves. 579; and she can do it in this way only; *Macauley v. Phillips*, 4 Ves. 18; an agreement out of court, even where the wife lives apart from her husband, is insufficient; *Macauley v. Phillips*, 4 Ves. 18; 1 Mad. Ch. 389. It is also to be observed that in all those cases where a settlement is made the husband is considered as entitled to the income of his wife's equitable interest, unless he has received some fortune with her, or has misbehaved; *Macauley v. Phillips*, supra; *Bond v. Phillips*, 3 Atk. 20; as by running away with a ward of the court, *Like v. Beresford*, 3 Ves. 506; or is separated from his wife; *Ball and Montgomery*, 4 Bro. C. C. 339; 2 Ves. jun. 191; or leaves her unprovided for; *Hock v. Thorington*, 2 Ves. 562; or has become a bankrupt; *Wiseman v. Mason*, 1 P. W. 459, n. or makes a general assignment for the benefit of his creditors.

Money due upon mortgage is considered a chose in action, and subject to the disposal of the husband alone, whether the mortgage be in fee or for a term; *Beovil v. Brondes*, 1 P. Wms. 458; *Doudy v. Bates*, 2 Atk. 208; for though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt.

If the husband 1 Roll. Ab. 342; 452: or husband and wife; *Moor*. 451; 1 Rol. Ab. 342. Gold. 160; make a letter of attorney to a person to receive a debt; 1 Rol. Ab. 342; or legacy; 1 Rol. Ab. 344; due to the wife, and he receives it, but does not pay it over to the husband, yet it vests in him. And where an executor paid a legacy to a *feme covert*, who lived separate from her husband, yet on a bill brought by the husband against the executor, he was decreed to pay it over again with interest; *Salk* 115, p. 14, 1 Vern. 261. So where a legacy was given to a *feme covert*, to be paid; 12 months after testator's death, and the wife died within the twelvemonth, the interest was holden to be vested in the husband, for he might release within the 12 months, 2 Roll. Ab. 134, Com. Dig. Bar, and Fem. 837. But where the husband dies without having made any disposition of a legacy left to the wife, it survives to her; Com. Rep. 725, *Brothero v. Hood*, 2 Ves 626, *Garforth v. Kradley*. The wife's distributive share of personal estate vests in her husband on the death of intestate, 2 Bro. Ch. Ca. 589, *Robinson v. Taylor*, 1 Anstr 63; *Sawyer v. White*. But possession by the husband as executor and trustee, is not such a reduction into possession of his wife's share in the residue, as will entitle him against her right by survivorship; 12 Ves 407, *Baker v. Hall*, 16 Ves. 413, *Hallen v. Tomlinson*. If the husband survive he has the legacy though he dies before it is paid; 1 Atk. 458; *Hamfrey v. Butler*. If husband and wife be evicted of a term which she enjoyed in her right, and he commence an act of ejectment in his own name, and obtain judgment, the recovery will change the wife's property in the term, and vest it in the husband, because it is a reduction of the term into his own possession; but if he had joined his wife in the action, then the judgment being joint, their interests would have been the same as before the eviction; so that if the wife survived she would be entitled to the residue of the term by survivorship. Equivalent to the husband's power of alienation of his wife's term, or trust term, is the disposition which the law makes of it in instances of his misconduct; 1 Rol. Ab. 841. pl. 50. That if he commit waste the term will be forfeited; Co. Lit. 351, or outlawed or attainted for felony; *Jenk. Rep.* 65. The husband may obtain a legacy left his wife, although they are divorced, *o mensa et thoro*; 1 Rol. Ab. 348, Cro. Eliz. 908, *Noy*. 45, *Moor*.

transaction in his own name it was quite impossible that it could pass away the interest of her husband by it. Rule absolute. See post, tit. Bills of Exchange and promissory Notes.

2. M'NEILAGE V. HOLLOWAY. H. T. 1818. K. B. 1 B. & A. 218.

This was an action on a bill of exchange by the husband of a woman to whom it had been made payable *dum sola*; but which did not become due until after her intermarriage with the plaintiff. Upon its being then dishonored plaintiff brought this action, and had a verdict, to set aside which, a rule nisi had been obtained, on the ground that the wife ought to have been joined in the action. *Per Cur.* If this instrument were a mere chose in action, it would be necessary to have joined the wife, as the marriage cannot operate to transfer a chose in action. But a bill of exchange is rather to be considered a chattel personal than a chose in action. It is in its nature assignable, transferable by indorsement, and capable of being appropriated, as it has been in this act by the husband. The act of marriage operates as a transfer of it to him in law, and is a virtual indorsement. And therefore in accordance with the case of Brett v. Cumberland, (3 Bulst. 164; S. C. Cro. Jac. 399,) in which Doddridge, J. (to which Cole, C. J. assented,) laid it down that the husband may well have an action in his own name without his wife, for the recovery of that which he may discharge alone, and of which he may make disposition to his own use; we must discharge the rule. Rule discharged. See Co. Litt. 351. b. Com. Dig. Baron and Feme. E. 3; 1 Rol. Ab. p. 347. R. pl. 3; 1 East. 432; 3 T. R. 631; 1 Sid. 172; 3 Wils. 5; 2 Ves. 676; Moor. 422; 2 Lev. 107; Bull. N. P. 179.

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And the husband of a woman to whom a bill of exchange has been given before, but which does not become due until after marriage, may sue alone on the bill, altho' the latter has not indorsed it. Whatever the wife earns during the coverture belongs solely to the husband. And the husband of a woman living separate from him, supporting his children, and earning a salary for her services is entitled to such wages, and may sue her employers for the amount, if they pay her after notice not to do so.†

3. BUCKLEY AND WIFE V. COLLIER. M. T. 1691. K. B. 4 Mod. 156. S. C. 1 Salk. 114; 3 Salk. 63; Carth. 251.

This was an action of *indebitatus assumpsit* by husband and wife, in which they declared that the defendant was indebted to them for perriwig maker's work done by the wife, "*ad damnum ipsorum*," and on demurrer judgment was given against the plaintiff, for this being a general *indebitatus assumpsit*, implied by law, the law will not imply any promise made to the wife, for she is as servant to the husband, who is at all the expense in furnishing her with materials, &c. and therefore the law implies that the promise was made to him only, and that he alone ought to have sued.*

4. GLOVER V. THE PROPRIETORS OF DRURY LANE. E. T. 1818. K. B. 2 Chit. Rep. 117. S. P. WAR V. HUNTLEY. 1 Salk 118; S. C. Holt 108.

This was an action to recover the value of the wife's services. It appeared that certain wages had been paid by the defendants to the wife, after notice from the husband to them not to do so. The jury upon a writ of inquiry had been directed by the under sheriff to consider the wife having care of, and maintaining plaintiff's children, and living separately from her husband, as the agent of her husband; verdict accordingly for one farthing damages. A motion was now made to set aside the inquisition for misdirection on the part of the under sheriff. The Court granted a rule nisi, which they afterwards made absolute, considering that the husband was undoubtedly entitled to the wife's earnings.

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And the husband of a woman living separate from him, supporting his children, and earning a salary for her services is entitled to such wages, and may sue her employers for the amount, if they pay her after notice not to do so.†

(2.) *Possessed by wife in autre droit.*

1. THRUSTOUT V. COPPIN. H. T. 1770. C. P. 3 Wils. 277; S. C. 2 Bl. Rep. 801.

In ejectment, the case was as follows; a man being possessed of a bene- 665, 3 Bulst. 164. But a husband divorced *a mensa et thoro* was restrained by injunction from selling a term of his wife's, Mod. 43.

* But if a special assumpsit had been brought by both, on an express promise to the wife, it had been good; Cro. Eliz. 69, 96, Cro. Cas. 439.

† And if a woman marries a second husband whilst her first husband is alive, she is deemed the servant of the former, and he will be entitled to the profits of her industry; Stratville v. —, 1 Stra. 80.

‡ The choses in action possessed by the wife, in *autre droit*, will belong to the wife if she survive, and, if she die in the life time of her husband, to the personal representatives of the person to whom she is executrix or administratrix; but during the coverture the husband alone may assign or surrender the term which the wife has as executrix, or he

A man possessed of a term of years, in right of his wife as executrix, has power

to grant
and convey
the same.*

facial lease of a term for years of the premises in question, in right of his wife, as executrix to her former husband, grants and releases all his right, title, and interest, of and in the same premises, to the lessor of the plaintiff. The question was, whether the husband, by the marriage, had such a title to the lease vested in him, that he could transfer and convey the same to the lessor of the plaintiff, so that he could recover in this action: the case was argued, and the Court took time to consider. *De Grey, C. J.* afterwards delivered it as the opinion of the Court, that the lessor of the plaintiff was entitled to recover; and this principally, because the husband may administer in the right of his wife, without her consent, though she cannot administer without the consent of her husband: so held by Brian, 2 Hen. 7. 15. See also Dy. 166; Salk. 303; Bro. Exec. 46. 96. 118. 151; 1 And. 117; Fitz. Exec. 23 5 Co. 27; Swinb. 342; Dier. 183; Cro. Eliz. 28; Arnold v. Bedgood, directly in point; Cro. Jac. 318; Moor. 54. And if the husband can administer *jure uxoris*, without her consent, it is incident to the power of administration to sell or dispose of a term of years.—*Postea* to the plaintiff.

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And as the husband is answerable for the wife's acts, she is not permitted to administer without his concurrence, nor will payments made to her as executrix or administratrix, without his consent, be valid.

2. ANON. E. T. 1635. K. B. 1 Salk. 282.

In an action for money had and received to the plaintiff's use, it appeared that the plaintiff's wife was executrix, and that the money had been paid to the defendant as due to her; and the plaintiff was nonsuited because the action ought to have been brought by husband and wife as executors; for it being paid without any authority from the husband, it remains as a debt due to the executrix, and, if the husband dies, the wife may bring an action for it: but if the money had been received by authority from the husband, then it had been as his receipt and as his money; and the action might well have been brought in his name, and the money would have been as assets in her hands. See *ante*, vol. 1. p. 234.

(f) *Right of husband to, and power over, wife's chattels personal.*

1. *Possessed by her in her own right.*

Marriage is an absolute gift to the husband of all the goods and personal chattels which the wife was actually and beneficially possessed of at that time in her own right, and of such other goods and personal chattels as may come to her during the coverture. (Co. Litt. 300.) He may therefore dispose of them by his will, which will be effectual whether he survive or not. He may also empower her to make a will to dispose of her personal estate, the nature and effect of which we shall now consider. The principle upon which this power of the wife is founded is, that her husband may waive the interest which the law secures to him in her property, by disabling her from disposing of it during the marriage. The husband's consent to the will must be given, either after his wife's death or by prior contract, and it entitles her executor to claim such articles of her personal estate, which would have been her husband's, as her administrator. It appears then that this consent is personal to the husband. It is no more than a waiver of his rights as his wife's administrator. It therefore can only give validity to the instrument in the event of his being the survivor. Hence it follows that if he die before his wife, the will is void against her next of kin, (15 Ves. 156.) and she will be considered as having died in-

may release or receive money due, on *choses in action*, of the person whom she represents; 1 Prest. Ab. 350. This power is allowed, lest she should misapply the funds, for which he would be liable; Jenk. Rep. 79.

* Hence the husband being possessed of a lease of tithes in right of his wife, as executrix, granted all his right, title, and interest in them, and it was determined that they legally passed to the grantee; Arnold v. Bidgood, Cro. Jac. 381. Upon the same principle, the husband may release debts owing to the estate of the testator or intestate, to whom the wife is executrix or administratrix; Br. *Baron and Feme*, pl. 80.

If he be entitled to a term for years in her right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged, because a man may have a freehold in his own right, and a term for years in *autre droit*; and it seems essential to merger, that the term and the freehold should vest in a person, in one and the same right; Co. Litt. 333 b; and see T. R. 401; 2 Roll. Rep. 572; 1 Roll. Abr. 934, pl. 10, 11; Cro. Jac. 275.

testate, if after her husband's death she makes no disposition of her property.

And so fixed and positive is the right of the husband to the personal effects of his wife, that if she was possessed of any anterior to the marriage, she cannot dispose of it in contemplation of the intended union, without her husband's privity. Thus *Lord Thurlow*, in the case of the Countess of Strathmore v. Bowes. 1 Ves. jun. 28, said, "A conveyance by a wife, whatsoever may be the circumstances, and even a moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud." See also *Howard v. Hooker*, 2 Ch. Rep. 81; *Ex. Ca. Ab.* 59; *Carleton v. the Earl of Dorset*, 2 Vern. 17; 2 Cox 33; 2 P. Wms. 359. But as the husband in strictness can have no right to any of his wife's property previously to the solemnization of the marriage, the wife is in general before marriage at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her with a view to their union; *Hunt v. Matthews*, 1 Vern. 408; 2 Ch. Rep. 81; 2 P. Wms. 359.

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2. Possessed by her in *autre droit*.*

Thompson v. Pinchell. T. T. 1707. K. B. 11 Mod. 178.

Poivel, J. In the case of husband and wife it is certain the law gives the goods of the wife to the husband, but not when she is administratrix, because she has then in *autre droit*.

As the wife takes no beneficial interest in the property she possesses in *autre droit* none can be transferred to the husband.

(B) OF THE LIABILITIES TO WHICH THE HUSBAND IS RENDERED SUBJECT BY THE MARRIAGE.

1st. For acts of the wife before marriage.

(a) For her contracts.

1. *O'Brian v. Ram*. H. T. 1687. K. B. 3 Mod. 170. 186. S. P. *Mason v. Burdon*. M. T. 1730. C. P. Prac. Reg. 91.

The husband is liable for the debts of his wife contracted before her marriage,† provided he be sued in her life time.‡

In arguing this case it was admitted, that if a *feme sole* be indebted and marry, an action will lie against the husband and wife, for he is liable to the payment of her debts. And it was also agreed, that if a judgment be had against a *feme sole*, and she marry, and afterwards die, the husband is not chargeable, because her debts before coverture shall not charge him unless recovered in her life-time. See *F. N. B.* 120. F; *F. N. B.* 121. C.

* In the immediately preceding division it was shown, that marriage was an absolute unqualified gift to the husband of all the goods and personal chattels of which his wife was absolutely possessed at that time, or became so afterwards in her own right, whether he survived her or not. Marriage, however, makes no such gift to him of the goods and chattels which belong to his wife in *autre droit*, as executor or administrator, because such a gift might prove disadvantageous to the creditors. See *Executor and Administrator*.

† Whether he had any portion with her or not, and this the law presumes reasonable, for as the husband, by the marriage, acquires an absolute interest in the personal property of the wife, and has the receipt of the rents and profits of her real estate during the coverture, and is entitled to whatever accrues to her by her industry, or otherwise, during the same period; the law in favour of creditors, and that no person's act should prejudice another, makes the husband liable to all those debts to which he took her subject; *F. N. B.* 265; 20 H. 6. 22. b; *Moor*. 468; *Roll. Abr.* 352; *Co. Lit.* 351. a. b. n. 1; 20 H. 6. 22; *Bul. N. P.* 136.

‡ But where a *feme sole* bought goods, but did not pay for them, and the goods came to her husband's hands, and the creditors, after her death, brought a bill in equity against the husband, to which he demurred, the Lord Chancellor, with earnestness, overruled the demurrer, saying he would change the law in that point; 1 Chan. C. 295.

Though in another case, *Heard v. Stamford*, 3 P. Wms. 403; S. C. Temp. Talb. 178; where the defendant's wife, before marriage, gave a promissory note for 50l. to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 200l., part whereof consisted in choses in action. The plaintiff did not, during the coverture, recover judgment upon the note against husband and wife. The wife died about a year after the marriage. Some of the choses in action had been received by the defendant as husband, in the life-time of the wife; the rest he took as her administrator. The plaintiff, finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to

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So he is
liable on a
warrant of
attorney
given by
her *dum*
sola.

Sed qu.
After the
husband's
decease,
his repre-
sentatives
are not
liable for
debts con-
tracted by
the wife
before mar-
riage.

Nor is the
husband
alone re-
sponsible
for use

[43]
and occu-
pation by
his wife
partly be-
fore and
partly after
marriage.

2. ANON. H. T. 1688. K. B. 1 Show. 91.

It was resolved in this case, that if a woman give a warrant of attorney, and then marry, the creditor may file a bill, and enter up judgment against both.

See 12 Mod. 383; 3 Furr. 1460. and *post*, tit. Warrant of Attorney; and 2 Arch. Prac. K. B. 14.

3. ANON. H. T. K. B. 1 Salk. 117. S. C. 12 Mod. 383.

Where a *feme sole* gives a warrant of attorney, and marries, the husband cannot, by such an act, be rendered responsible.

4. WOODMAN V. CHAPMAN, WIDOW. H. T. 1808. N. P. 1 Campb. 189.

The defendant in this case, it appeared, contracted a debt before her marriage with her late husband. The question was, whether his representatives were liable. *Lord Ellenborough, C. J.*, held, that as the debt survived against her upon her husband's death they were not.

5. RICHARDSON V. HALL. E. T. 1819. C. P. 3 Moore. 307; S. C. 1 R. & B. 50.

Assumpsit for use and occupation of a house. Declaration stated, that the defendant was, on the 1st of April, 1818, indebted to the plaintiff in a certain sum, for the use and occupation of a house, situate, &c., and held and occupied by him, and at his request; and that he had promised to pay. It appeared on the trial, that the house had been occupied by the wife of the defendant for some years before her marriage, under an agreement to pay the rent half yearly, each year being completed at Michaelmas. The defendant's wife paid the rent up to Lady-day, 1817, when she gave notice to quit at the succeeding Michaelmas, which, together with the key, the plaintiff accepted, and took means to let the house. She married the defendant on the 8th of June in that year. The defendant had never occupied nor paid rent for the plaintiff's house, but had a separate house of his own, in which his wife, on quitting her own shortly after the marriage, resided. The defendant's counsel objected, that in order to gain a verdict in this action, the defendant's wife should have been joined; but the judge being of opinion, that as the notice to quit was duly proved, the defendant's liability for the half year's rent to Michaelmas, 1817, arose from privity of estate, a verdict for that amount was accordingly found for the plaintiff. A rule *nisi* being obtained for entry of a nonsuit, on account of the objection raised at the trial, the plaintiff's counsel endeavoured to show that the action was properly brought, as the engagement of the wife to pay the rent was only *inchoate* before the marriage, after which period it became a perfect debt; and he therefore contended, that as the husband was, on general principles, solely liable, immediately on the marriage, for all debts of the wife which might become due during, but imperfect at the time of, the marriage, the present case was within the meaning of the rule.

Sed Per Cur. The plaintiff has adopted a form of action given by statute and founded upon the averment of occupation, which ought to be strictly proved. It appears that the wife, before marriage, occupied the house for a considerable time, at her own request solely, but the plaintiff has not attempted to show any occupation or request by the husband, as alleged in the declaration. In *Naish v. Tatlock*, 2 H. Bl. 320. it was decided, that the "special instance and request of the defendant in this form of action, were material words, and must be proved; but as that action was brought against assignees, for occupation by answer his (the plaintiff's) demand, for so much as he had received out of the clear personal estate of the wife upon the marriage.

The Lord Chancellor said, that as on the one hand the husband was by law liable, during the coverture, to all debts contracted by his wife *dum sola*, whatever their amount might be, although she did not bring him a portion of one shilling, so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. He added, that the wife's *choses* in action were assets, and thereupon he decreed an account of what the husband had received since his wife's death, as her administrator, and that he should be liable for so much only; but, as to any farther demand against him, dismissed the bill.

a bankrupt, it has been attempted to distinguish it from the present, on the ground of the difference in the character of a husband and an assignee, whose liability cannot arise on the engagements of a stranger; whereas, that of a husband takes place on the marriage, without his concurrence. We however think, that this distinction, though true in general, is not available in the present case. Rule discharged. See Aley. 72; 7 T. R. 318; Com. Dig. Baron and Feme, Y.

(b) *For her torts.*

The husband is liable jointly with his wife for *torts* committed by her before marriage. 1 Bac. Ab. tit. Baron and Feme, L.

(c) *When liability for such acts terminate; and see div. ante, (a)*

Where an action is brought against husband and wife upon her contracts or for her *torts* before coverture, if she die before judgment, the suite will abate; but if the husband die, or become bankrupt, her liability will continue; 7 T. R. 350; Com. dig. Baron and Feme, 26.

2d. FOR ACTS OF THE WIFE DURING THE MARRIAGE

(a) *For necessities obtained by her during cohabitation.*

1. MANBY v. SCOTT. T. T. 1663. Ex. Cham. 1 Mod. 125; S. C. Brid. Rep. 229; S. C. 1 Bac. Ab. 296.

Per Hyde J. It is agreed by all the judges, that a feme covert generally cannot bind or charge her husband by any contract made by her, without the authority or assent of her husband, either express or implied.

2. MANBY v. SCOTT. T. T. 1663. Ex. Chamb. 1 Bac. Ab. 296; S. C. 1 Mod. 125; S. C. Bridg. Rep. 229; ANON 5 Show. 283.

Per Hale, C. J. We all agree, that when the wife contracts for the necessities of her husband, children, or family, that this shall not charge him by any inherent power in the wife, but by a reasonable and implied assent, which must be found by a jury; but we differ in charging him. When she contracts for the supply of her own necessities, we say it is not by a power she has, but there must be his consent either express or implied. 2dly. We confess, that in case of cohabitation, there is great evidence of his assent till the contrary appears; but it is not so binding as will amount to a presumption, Therefore we say it must be found by a jury.

I confess, that when a wife, though not particularly appointed, contracts for necessities for herself, her family her husband, or her children, this is *prima facie* evidence to a jury to make them find the assent of the husband, if nothing be proved to the contrary; for it cannot be reasonably thought that any man would be so barbarous as to deny his consent to have the necessities of his family supplied, and so it may be believed and found he did assent; but this only in case of cohabitation.

band, was considered only presumptive evidence of his assent.†

- ETHERINGTON v. PARROT. H. T. 1702. K. B. 2 Ld. Raym. 1006; S. C. 1 Salk. 118; S. C. Holt. 102.

In an action for goods sold and delivered, the evidence to charge the defendant was, that the goods were purchased by the defendant's wife to make her clothes, and that they cohabited together; but on the defendant's side it was

* And in *Montague v. Benedict*, 3. B. & C. 637; S. C. 1 Carr. 356; the general rule was stated to be, that a husband is not liable in respect of a contract made by his wife without his assent to it; and a party suing to charge him in respect of such contract, is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied; see *Skin. 343*; Com. Dig. Baron and Feme, 2; 1 Camb. 120; 3 id. 22; 5 Taunt. 356.

† In respect of the wife's contracts binding the husband, they are analogous to the relation of master and servant. In fact, in contemplation of law, the wife is the servant of the husband. In *F. N. B. 120* it is stated, that a man shall be charged in debt for contract of his bailiff or servant, to buy or sell for him, and so for the contract of the wife if he give such authority to his wife, otherwise not; therefore, a surgeon who is sent for by the wife or servant of A. B. to visit his sick child, can recover the bill only upon an express contract by A. B. or upon a presumption that A. B. gave his wife or servant authority to send for the surgeon. *Per Bridgman, C. J. Manby v. Scott, Bridg. Rep. 256; see 3 B. & P. 247.*

The wife cannot bind her husband by any contract [41] without his consent, * either express or implied.

Cohabitation being evidence only, of the husband's assent in a special verdict, that assent ought to be found, and as it is merely presumptive evidence, it may be rebutted by contrary evidence. Hence, proof that the articles were consumed in the family of the husband [45]

But it has been since holden, that during cohabitation the husband shall be answerable for all contracts of the wife for necessities,

Unless the husband gives notice to the trader, not to trust her,

What are or are not necessities must depend on the rank and situation of the husband.*

For if the articles supplied be unsuitable to her husband's degree, and be delivered to her without his knowledge and she gives her own note in payment.

[46]

Or the tradesman gives credit to her, the husband is not liable, though he may have seen his wife wear some of the articles furnished to her.

proved, that his wife was an extravagant woman, and used to pawn her clothes for money to buy drink, and be intoxicated; that she pawned a suit of clothes which cost 7*l.* for 1*l.* 8*s.*, and when her husband redeemed them, pawned them again; that at the time of buying these, she had very good clothes; that she had bought clothes here before, and her husband had paid for them; but when he paid for them, he had given notice to the plaintiff's servant, who received the money, that his master should trust her no more, which he promised not to do.

Per H. L., C. J. If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities for her; but if she runs away from him, he shall not be liable to any of her contracts, for it is the cohabitation that is evidence of the husband's assent to contracts made by his wife for necessities; but if the husband has solely declared his dissent that she shall not be trusted, any person that has not notice of this assent, trusts her at his peril after; for the husband is only liable on account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; for the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides; and if he does not provide necessities, her remedy is in the Spiritual Court. But here were sufficient necessities provided, and also the husband had forbid the plaintiff to trust her; and notice to the plaintiff's servant, usually employed by him in his trade, is a good notice to his master, and therefore he cannot charge the defendant. On which the plaintiff was nonsuited.

4 OZARD v. DARYFORD. M. T. 1780. K. B. Cited 1 Selw. N. P. 273.

In assumpsit for the board and lodging of the defendant, on non assumpsit pleaded, Lord Mansfield, C. J., in his charge to the jury, laid it down as clear and decided law, that when husband and wife lived together, the husband is answerable for all such necessities wherewith the wife may have been furnished; but that what are or are not necessities must depend on the rank and situation of the husband.

5, METCALFE v. SHAW. E. T. 1811. K. B. N. P. 3 Camp. 22.

A woman residing with her husband, who was an apothecary in a small country town, without her husband's knowledge that she had any dealings with the plaintiff, who was a dress-maker, ordered and was supplied with wearing apparel in excessive quantities. In an action against the husband on a promissory note, given by her in her own name, in payment for these articles, Lord Ellenborough, C. J., held, that as the plaintiff had supplied the wife on her own personal credit, that the husband was not liable for any part, of the goods, though it did not appear that he had supplied her with necessities, since no authority had been given to the wife to act as his agent, and without such authority, she had no power to make the note. Plaintiff nonsuited.

6. BENTLEY v. GRIFFIN. H. T. 1814. C. P. 5 Taunt. 356.

It appeared in this case that the plaintiff, who was a dress-maker, had supplied the defendant's wife with goods to a considerable extent, and for which he had made reasonable charges; that he had placed them to the account of the wife, and had been satisfied for part of his demand, by certain bills of exchange, which he had directed to the defendant by his name, but no proof was adduced that they were presented to him for acceptance. It was shown that the bills had been accepted and paid by the wife, whose initial letter only appeared to them. The defendant lived with his wife, who had worn some of the goods in his presence. The evidence for the defendant showed, that the servant received orders from the defendant's wife to put away the things when sent home, in order that the husband might not see them; and that, in his and the plaintiff's presence, his wife had stated that she always paid her own bills, and that her husband never did; and that on one of the bills given by the wife, being dishonoured, the plaintiff had, instead of applying to the defendant, written in a pressing manner to the wife, requesting her to provide for it. The jury found for the plaintiff, and on a rule nisi, for a new trial, the Court gave it as their opinion.

* And the jury are to judge whether the goods are suitable to her husband's rank; *Montague v. Benedict*, 8 B. & C. 637; S. C. 1 Carr. 366.

ion, that the facts of this case clearly established a credit given to the wife, which freed the husband from his liability. Rule absolute. See 1 Camb. 120; 3 *ibid.* 22.

7. MORTON v. WITHEENS. E. T. 1692. Skin. 348.

In assumpsit for goods sold and delivered by the plaintiff to the wife of the defendant. Non assumpsit was pleaded; and upon evidence it appeared, that the goods were silver fringes and laces, for a petticoat, and side saddle, and that they were all delivered within the compass of four months, and that they amounted to 94*l*, and that part of them were delivered to a carrier for the wife of the defendant, by the order of Mrs. Rider, upon a letter of the wife to Mr. Rider; and that the other part were delivered upon a letter of the wife to the plaintiff; and that the laces were worn and used by the wife in the view of the defendant, and that the wife at that time lived with the defendant in the same house. For the defendant it was insisted, that a long time before the delivery of these goods, there was a difference between him and his wife, and that they for the space of two or three years, had not lived together; and that the wife declared to the defendant that she would charge him with 500*l*. in one term, and would have him in gaol in the next—and all this before the goods were delivered; and that for many years the wife had an allowance for clothes; viz. 50*l*. per annum, and no evidence was given that she had any occasion to have these clothes, so as they could appear to be necessary. And the same day another action was tried for velvet and tissues, of 3*l*. per yard, to the value of 80*l*.; and Treby, C. J. directed, that if the jury found the plaintiff innocent of the design of the wife, to ruin the husband, and delivered the laces, &c. as goods fit for the wife, and upon the credit of the husband, without notice of the difference between them, that the husband shall be obliged to pay the plaintiff for it is part of his promise of marriage to feed and clothe her; and though she had an allowance, this was secret, and of which the plaintiff had not notice; but if the plaintiff had notice of the differences between the husband and wife, and sold them only to enable the wife to ruin the husband, then the defendant would not be chargeable; and though the husband be chargeable heretofore, yet, after such a solemn trial, and their differences made so public, he held that the husband shall not be chargeable; and likewise, if the plaintiff was not privy to their differences, but delivered the goods innocently, yet, if the goods were not suitable to the quality of the wife, the defendant should not be chargeable; and if part be only suitable, he should be charged for that part only. Upon this direction the jury found generally for the plaintiff for his whole damages.

So if a tradesman having notice of a difference between a man and his wife, sells the wife goods only to enable her to ruin her husband, there the husband shall not be chargeable; but if part of the goods be suitable to the husband's degree, he shall be chargeable for that part.

[47]

8. WATSON v. TRELKELD. E. T. 1798. N. P. 2 Esp. 637. S. P. CAR v. KING. E. T. 1703. K. B. 12 Mod. 372.

This was an action for goods sold and delivered. The articles were furnished by the plaintiff to a woman who, at the time of the delivery at the defendant's lodgings, was called by his name in his presence; in fact, it appeared, defendant himself selected one of the articles. Defendant relied on the circumstance that plaintiff knew, at the time the goods were delivered that she was not his wife; but Lord Kenyon, J. was of opinion that the defendant was responsible, whether the tradesman knew the circumstances to be so or not, because he gives her credit from his name and cohabitation. Indeed, it is unreasonable to suppose, a tradesman gives credit to a woman of that description in preference to the man by whom she is supported.—Verdict for plaintiff.

And the same rules obtain where a man cohabits with a woman, and allows her to assume his name;

9. ROBINSON v. NAHON. H. T. 1808. N. P. 1 Campb. 245.

In an action for use and occupation of apartments by the defendant's wife, it appeared that the apartments had been occupied by a lady, who assumed the defendant's name, and who had actually been married to him. The defence was, that defendant had a former wife still living; but Lord Ellenborough said, there was no proof that plaintiff was aware of the former marriage, and that consequently bigamy is no bar to the action, since he had done all he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility.—Verdict for the plaintiff.

Or marries a woman during the existence of a former as wife,

10. *MUNRO v. DE CHEMENS*. T. T. 1815. K. B. 4 Campb. 215.

The defendant had lived with a woman for 17 years, and treated her as his wife. The plaintiff having supplied her with goods after the defendant had abandoned her, and while she was living separate from him without any allowance, brought an action against the defendant for the value thereof. But

But they only hold with regard [48] to an unmarried female during cohabitation,

Lord Ellenborough, C. J. said, the defendant's liability for the necessities supplied to her after they separated, depended entirely whether he had been really married to her or not. If the jury considered they had not been married they must find for the defendant; if they thought they had been married, they must find for the plaintiff.

11. *WATSON v. THRELKELD*. E. T. 1798. N. P. 2 Esp. 637.

And do not apply even then to a common prostitute. A husband is not chargeable for necessities provided.

In an action for goods sold and delivered to a woman kept by defendant, *Lord Kenyon, C. J.* observed, that a common strumpet who may assume the name of a person casually known to her, but without his authority, does not render him responsible for goods furnished to her.

(b) *For necessities obtained by her after she has committed adultery.*

1. *MORRIS v. MARTIN*. M. T. 1726. K. B. 1 Stra. 647.

In an action for meat, &c. provided for defendant's wife, the defendant proved she went away from him with an adulterer; and *Raymond, C. J.* held, that the husband should not be charged with necessities for her, though the plaintiff, who provided for her, had no notice; and he said *C. J. Holt* had ruled, it so.

2. *MANWAIKING v. SANDS*. T. T. 1739. K. B. 1 Stra. 706.

Or goods sold to an adulteress.*

This was an action against the husband for a carved head sold to the wife, it was proved that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that did not signify for she would pay him herself. *Raymond, C. J.* held the defendant not chargeable.

3. *GOVIER v. HANCOCK*. E. T. 1796. K. B. 6 T. R. 603.

Although the husband has been the aggressor by living in adultery with another woman.

In this case, the husband having committed adultery, treated his wife with great cruelty, and refused to maintain her; the wife then committed adultery, and subsequently offered to return home, but the defendant refused to receive her. In an action of *assumpsit* for her board and lodging after that time, the judge who tried the cause, being of opinion that the husband was not bound to receive the wife after she had committed adultery, and consequently, not bound to support her, directed a verdict for the defendant. And on motion for a new trial, the Court refused a rule.

[49]

4. *CHILD AND ANOTHER v. HARDYMAN*. T. T. 1731. 2 Stra. 875. S. P. *MANBY v. SCOTT*. T. T. 1663. Ex Chamb. 1 Mod. 124; S. C. 1 Sid. 109; S. C. 1 Lev. 4; S. C. Bac. Abr. 266; S. C. Bridge. Rep. 253. *HALL v. YATES*. T. T. 1708. 11 Mod. 241.

And he is not liable, notwithstanding she merely elope with out going away in an adulterous manner, if the husband subsequently offer to take her back.

In an action for linen sold to the defendant's wife, on *non assumpsit* pleaded, delivery was proved, and that she lived in a very lewd manner; one N. frequently coming to her in her husband's house, and that they were locked up together in a bed-chamber, and that other indecencies passed between them. And it was also proved, that she several times went to the house of N., who lived within three miles of the defendant's house. It did not appear farther than that he disliked her going and staying at Mr. N's, but under these circumstances they continued to live together. Afterwards she went away from him and went to Marlborough, where she resided for some time. But after the leaving her husband's house, it did not appear that she ever saw N., or lived in a lewd manner. After some time she sent L., an attorney, to her husband, to desire that he would receive her again; the husband told him, that if she came again, she should never sit at the upper end of his table, nor have the

* Even although he may have turned her out of doors, if it be on account of her having committed adultery under his roof; *Ham. v. Toovey*, M. S. cited 1 Selw. N. P. 272.

In an action for board and lodging supplied to the defendant's wife, if the defence is the adultery of the wife, a statement made by her, confessing her adultery, which was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband; and so are letters from different men found by him at that time in her writing-desk; 1 Carr. 621.

government of the children, but should live in a garret. Then L. proposed to him to make her an allowance, and suggested about 80*l.* or 100*l.* per annum, he being worth about 500*l.* or 600*l.* a year, but that was not complied with; and afterwards she came to London, and bought linen of the plaintiff to the amount of 53*l.* Raymand, C. J. was of opinion that the plaintiff should be nonsuited. He held, if a woman elopes from her husband, though she does not go away with an adulterer, or lives in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases; indeed if he refuses her again, from that time it may be an answer to the elopement. In this case he does not absolutely refuse to receive her again, but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret, and she deserved no better usage. The plaintiff was nonsuited.

HARRIS v. MORRIS. T. T. 1801. N. P. 4 Esp. 41.

Assumpsit for necessities furnished to the defendant's wife. It appeared that she had eloped after committing adultery, and that the defendant received her again; but that in consequence of some subsequent misunderstanding, he had turned her out of doors. The plaintiff, it appeared, had received her into his house, and provided her with the necessities for which the present action was brought. *Per Lord Kenyon, C. J.* Although an adulterous elopement will exonerate the husband from responsibility for necessities during the time; yet if the husband receive her again, from that period she is *sponde retracta*, and entitled, therefore to maintenance.—Verdict for plaintiff.

See post, tit. Divorce; and *Dunn v. Dunn*. 2 Phil. Rep. 403; 3 id. 6.

6. NORTON v. FAZAN. E. T. 1798. C. P. 1 B. & P. 226.

To an action of *assumpsit* for necessities supplied to the defendant's wife, the defence was, that when such necessities were furnished, she was living in a state of adultery; and it appeared, that on the defendant finding that a criminal connexion subsisted between his wife and a stranger, he quitted his house, leaving in it his wife and two children, bearing his name; and that the adulterous intercourse was continued there, when the articles in question were sold to the wife. The defendant had not made any separate provision for his wife. The jury found for the plaintiff; and on a rule *nisi* to set aside the verdict being moved for, the Court were unanimously of opinion, that as the plaintiff did not know, nor was bound under the circumstances to know the improper manner in which she was living, the defendant was liable, especially as she had been allowed by him to appear in the world to be still under his protection.—Rule refused.

7. COX v. KITCHIN. M. T. 1798. C. P. 1 B. & P. 338.

To an action of *assumpsit* for goods sold, &c. the defendant pleaded coverture, and it was proved she was a married woman, and that her husband was living, but that for some years she had passed by the name of one Kitchin, with whom she cohabited; and that the plaintiff's claim arose for materials found, and work done for the defendant in an hotel, of which she was proprietor. The jury having found for the plaintiff, a rule *nisi* for a new trial was moved for, on the ground that it did not appear that the defendant had a separate provision, which the counsel contended was the principle on which all the decisions on the subject had been determined. The Court said, that as the judge had not reserved the point at the trial, the granting such an application was discretionary on their part; and considering that the effect of the decision in favour of the defendant would be injurious to her, inasmuch as she could not gain credit for necessities for her subsistence, unless she was responsible for them, refused the rule. See 4 T. R. 766; 1 B. & P. 357; 6 T. R. 603.

8. MARSHALL v. RUTTON. E. T. 1800. K. B. 8 T. R. 545.

The Court, in giving judgment in this case, observed, that if a woman elope from her husband, withdraw herself from his protection, and live in adultery, she is not liable to answer for her necessities; and no case has decided that she is so.

But if a feme has been guilty of adultery and the husband receive her again into his house, and afterwards turn her out;

[50]

Or, if he leave her in his house with his children, after the commission of adultery, he is liable for necessities furnished to her. And it seems formerly, that a feme covert living in adultery was bound by her contracts for necessities though she had not a separate maintenance; and the creditor might have sued her or the husband, at his election.

But a different doctrine now obtains.

(c) For necessities supplied to her while the husband is transported or abroad;
see post, p. 79.

[51] (d) To pay for necessities supplied to children of the wife by a former marriage.

1. COOPER v. MARTIN. T.T. 1803. K. B. 4 East. 76. S.P. TUBB AND OTHERS v. HARRISON. M. T. 1790. K. B. 4 T. R. 118.

If a man marry a widow, he is not bound to support her children, though they were maintained by the widow before her second marriage; and if he maintain them, a good consideration is raised for a promise by such children when they come of age to repay the expence of their maintenance.

This was an action by a party who had married a widow, who had at the time several children by a former marriage, against one of those children, who had been maintained by the plaintiff for several years, during his minority. to recover a compensation for the expences he had thereby incurred. It was proved, that after the defendant came of age, he promised to pay. It appeared that the plaintiff was a man of small substance, and that the children had had left them a competent provision, which they were to receive when they came of age, and which was to accumulate for them in the mean time; and that the defendant and the other children had, previous to their mother's marriage with the plaintiff, lived with and been maintained by her. The jury had been directed to consider, whether the plaintiff had supplied the plaintiff with more than his condition required; and had been told by the judge, that if he had not, it was a meritorious consideration to support the promise made by the defendant after he came of age; and although they thought that more than was strictly proper had been expended, they found a verdict *pro tanto* for the plaintiff. The defendant had leave to move for a rule to enter a nonsuit, or to show cause why a new trial should not be granted. A motion to this effect was accordingly made. *Per Cur.* The early cases on the subject have proceeded on a mistake in considering the maintenance of the children as a debt of the mother, who has married a second husband, or as a debt on her estate. The wants of the children are only a ground for an order of maintenance on the parent, if of sufficient ability. But when she has parted with that ability by her second marriage, she is no longer liable. This, therefore, shows that the husband cannot be forced to pay what he has out of his own pocket, and is, consequently, entitled to a verdict, for having done an act beneficial for the defendant in his infancy; it is a good consideration for the defendant's promise after he came of age; and besides, the plaintiff might have applied to Chancery to have had part of the accumulation for the maintenance and education of the defendant, which would have been granted to him. In such a case as this, the Court will imply a request, and the fact of the promise has been found by the jury. We must, therefore, discharge the rule. See 1 Stra. 190. 690; 1 *Ld. Raym.* 389; 3 *Esp.* 1; *Comb.* 321; 2 *Bulst.* 346; *Styl.* 283; 1 *Bro. Ch. Ca.* 268; 4 *T. R.* 118; *Foley.* 39; 1 *Const.* 325; 43 *Eliz.* c. 2. s. 7.

2. STONE v. CARR. E. T. 1798. N. P. 3 *Esp.* 1.

Assumpsit by plaintiff, a schoolmaster, for the education of defendant's wife's son by a former husband. It appeared, that since defendant's marriage, the children of defendant's wife by her former husband, lived with defendant as part of his family, and was provided for by him as such. Defendant proved, that during his absence abroad, the child had been sent by his mother to plaintiff's school. It was, therefore, contended, that as there was no contract made by him with the plaintiff, he could not be charged by reason of any implied liability. But *Lord Kenyon* said, if a man receive the children of his wife by a former husband into his house, and provide for them as part of his family, he then stands *in loco parentis*. The defendant in this case had adopted them, and having gone abroad, he left them under his wife's care; she, in her discretion, and in his absence, made a contract for their maintenance and education, and he should, therefore, hold defendant bound by it.—Verdict for plaintiff.

(e) For necessities obtained by wife after separation.

1. *By mutual consent.*

1. *TOD v. STOKES.* M. T. 1698. K. B. 12 *Mod.* 244; S. C. 1 *Lord Raym.* 444; S. C. 1 *Salk.* 116; S. C. 1 *Holt.* 100. S. P. *RAMSDEN v. AMBROSE.* 1 *Stra.* 127.

[52] But if he holds them out to the world as part of his family, he then stands *in loco parentis*, and is liable for a contract entered into by his wife for their education during his absence abroad.

The plaintiff, an apothecary, sued the defendant a clergyman, living in Chichester, for physic administered to his wife in London; on *non assumpsit* pleaded, it appeared in evidence, that the defendant and his wife had been parted by consent, for five years then past, and that, on a separation, by articles made to trustees of the wife's naming, the defendant had obliged himself to allow the wife 20*l* a year, which he did accordingly, and had a covenant from the trustees to exonerate him of all the charges of the wife; and that the plaintiff did not know the wife to be a *feme covert* at the time the medicines were administered. *Holt, C. J.* held, 1st, That the reason why the husband shall pay debts contracted by his wife is, on the credit the law gives her by implication, in respect of cohabitation; and is like a credit given to a servant. 2dly, That if the husband and wife part by consent, and the husband secures her an allowance, it is in consideration that he should not be charged any more by her; and it is unreasonable he should be charged for victuals or physic, or other necessities, after. 3dly, That a personal knowledge of such agreement is not necessary, so it be publicly and notoriously known. 4thly, That such public knowledge of the agreement need not be at London, where the debt was contracted, but is sufficient if it be where the parties lived, viz. in this case at Chichester. 5thly, That if the debt was contracted by the wife, in so short a time after the agreement, as it could not be known at Chichester, in that case the husband would be liable.

A husband who allows his wife a maintenance, is not liable to debts contracted by her after a notorious separation;

2. RAWLYNS V. VANDYKE. M. T. 1800. N. P. 3 Esp. 250. S. P. BEAUMONT V. WELDON. 2 Vent. 155.

Assumpsit for necessities supplied to defendant's wife. Defence, that plaintiff knew that she lived separate from her husband on a weekly allowance.

Per Lord Ellen. It was formerly holden, that where a wife lived apart from her husband on an allowance, that that was sufficient to charge the wife; but the law is now different; nor does it follow that, because the wife is not liable, the husband should be; for if the tradesman has notice of a separate maintenance, the *onus* of proving which is thrown upon the husband, it is equal to an express dissent of the husband, and he shall not be liable. I am, therefore, of opinion, that for the things furnished after notice, the husband is not responsible.

Especially if the tradesman [53] has personal notice of the separate maintenance.

3. NURSE V. CRAIG. H. T. 1303 C. P. 2 N. R. 148. S. P. OZARD V. DARNFORD. M. T. 1730. K. B. Cited 1 Selw. N. P. 273.

Husband and wife having agreed to separate, a deed of separation was executed (between the husband on the first part his wife on the second part, and a trustee, the sister of the wife, on the third part,) wherein the husband covenanted with the trustee, to pay the wife, during the separation, a weekly allowance, which she agreed to accept, in full satisfaction of her maintenance, provided, that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance until he should be reimbursed. The wife, upon the separation, went to live with the trustee, who supplied her with necessities; the husband having failed to pay the weekly allowance, the trustee brought an *indultatus assumpsit* against him for the amount of the necessities. It was holden by *Chambre, Roake, and Heath, Justices*, that although the trustee had another remedy, and might have brought an action on the deed; yet *assumpsit* was maintainable on the ground that there was a common law obligation on the husband to provide necessities for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, without payment, was not sufficient to exempt the husband from this liability. But *Manfield, C. J.*, expressed a different opinion, observing, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued, either in *assumpsit* or debt, for necessities furnished to his wife.

Provided the husband pays the allowance;

4. *HODGKINSON v FLETCHER*. M. T. 1814. K. B. N. P. 4 Campb. 70.

Some years since the defendant and his wife separated, without any deed or agreement to make her an allowance. Soon afterwards she sued for a divorce; and the suit being dismissed, he made her an allowance of 300*l.* per annum. The husband resided in the country, and the wife in London; the latter having purchased goods of the plaintiff, which he debited to her in his books; she, however, disclaimed her liability, and desired him to sue her husband, who was a man of property. At the trial, it appeared that the goods furnished to her were necessaries suitable to her husband's circumstances. Her receipt for the allowance was offered as evidence of its payment. *Per Lord Ellenborough, C. J.* The allowance for maintenance must not be precarious, and it must be suitable to the husband's fortune and rank in life, which is a question proper for the consideration of a jury; and if it be found to be inadequate, the husband will not be discharged at law from his liability to answer for his wife's contracts for necessaries; and her acquiescence in receipt of the allowance will not affect the rights of her creditors against him; and I am of opinion, that the wife's receipts are not admissible to prove that a separate maintenance had been paid.—Verdict for plaintiff.

5. *LIDBLOW v. WILMOT*. E. T. 1817. K. B. N. P. 2 Stark. 86.

A separation between the defendant and his wife had taken place thirty years prior to the present action, during which period the defendant had formed another connection, and had a daughter who was living with him, of the age of 25. It appeared that the wife had separate funds of her own, amounting to 110*l.* per annum, and that she had not made any application for any funds subsidiary, but had always lived on her own resources. The wife died, and the plaintiff, during her life-time, having provided her with lodging and necessaries, brought an action against the defendant, her husband, to recover the amount then due. But *Lord Ellenborough, C. J.* said, the only question is, whether she has been furnished with resources adequate to her situation; if so, this action cannot be maintained; the husband is only liable in case of insufficiency of funds; and if her means be adequate, whether they are derived from her own funds or her husband's, it makes no difference. The jury being of opinion that they were an adequate maintenance, consistent with her husband's property, found a verdict for defendant.

6. *BURRETT v. BOOTH*. F. T. 1818. C. P. 8 Taunt. 343.

It appeared in this case that the defendant had, on separating from his wife (who had not any settlement on her marriage, though she had considerable property), transferred to trustees, for her use, all her own property, and had covenanted for her enjoyment thereof, free from his interference. And the trustees, on her part, covenanted that he should be free from any demand by her of allowance, and from her debts; and that no suit should be instituted by her against him in the Ecclesiastical Court. The wife, however, did commence proceedings for restitution of her conjugal rights, and obtained judgment; and that subsequently, on fresh ill-treatment of the wife by the defendant, a second separation took place, and the wife lodged with the plaintiff for some time, on which his debt accrued. The only defence offered was, the production of the deed of separation and transfer before mentioned. The jury found for the plaintiff. A rule nisi for a new trial being obtained, it was insisted for the defendant, that as the re-cohabitation of the defendant with his wife, after the execution of the deed in question, was not a consequence of his will, but compulsory, and in opposition to it, it formed no part of the case; and that an absolute transfer like the present was distinguishable from a regular allowance; as, in this case, the consideration of the husband's liability was destroyed by the transfer.

But the Court refused the motion, on the ground that the defendant had not shown that the trustees had taken possession pursuant to the terms of the deed, and observed, that it was incumbent on the husband, beside making a provision for the wife, to take care that every thing necessary to carry the deed into effect was performed by the trustees.

7. **WAITHMAN AND ANOTHER V. WAKEFIELD.** M. T. 1807. N. P. 1 Campb. 120. Action for goods sold and delivered. Plea general issue. It appeared that the goods in question were furnished for the defendant's wife after she had ceased to cohabit with him, but it was shown that, after the goods were sent, the plaintiffs having received information of her situation, insisted upon having the money, or the goods returned, on which occasion defendant was present, and wished all the articles to be returned but she refused. Lord Ellenborough said, in general when a man and his wife are living separate, the husband is only liable for such necessaries as are suitable to his station in life; but, whether the articles are so or not, if it is in the husband's power to return the goods, and he omits to do so, he renders himself liable, and it is no answer to say that the wife is disobedient, because he must be supposed to exercise his martial rights; in fact it was his duty, when payment was demanded, to control the re-delivery.

The husband is liable for the debts of the wife, altho' he does not cohabit with her, if when the goods are furnished he is present and does not cause them to be returned.

8. **WAITHMAN AND ANOTHER V. WAKEFIELD.** M. T. 1807. N. P. 1 Campb. 120.

In deciding the preceding case, Lord Ellenborough, C. J. said if the husband be privy to his wife's going about attended by a livery servant, assuming a state of affluence he cannot maintain, he must suffer the consequences; however much the debts incurred by her may be beyond his means. It was not only the duty of tradesmen, but it was incumbent upon them, to show that they had made necessary inquiries, for the purpose of ascertaining the situation of a stranger before they gave credit, to entitle them to recover in an action more than for necessaries suitable to the husband's means.

And if the articles be corresponding with the appearance of the husband

allows her to assume, the tradesman may recover, though inconsistent with his real situation.

9. **HORNBuckle V. HORNBURY.** T. T. 1817. K. B. 2 Stark. 177.

The defendant, who allowed his wife a separate maintenance, promised to pay the amount of a debt, which she had contracted during the separation. In an action on that engagement, Lord Ellenborough, C. J. said, the defendant was bound by such promise, and that he could not afterwards recede from it, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he had made the promise under a misapprehension of law.

So the husband may be sued on a promise, even tho' made under a mistake, as to his legal liability

10. **RAWLYNS V. VANDYKE.** M. T. 1800. N. P. 3 Esp. 250.

Assumpsit for necessaries for defendant's wife and children. Defence, that defendant's wife lived apart on a weekly allowance, and that that fact was known to plaintiff anterior to the time the articles were furnished. Lord Eldon said, he did not mean to lay it down as law, that where necessaries were furnished for children, living apart from their father, that he was necessarily liable; but if he allowed them to continue with the mother, he made her his agent, and authorised her to contract debts for their support. Verdict for plaintiff.

And if a man permit his children to live with his wife after the separation, he gives her an implied authority to purchase necessaries for them.

2. *By husband's ill-treatment.*

1. **TODD V. STOKES.** E. T. 1698. K. B. 1 Ld. Raymond. 444; S. C. 12 Mod. 244; S. C. 1 Salk. 116. S. P. **HARRIS V. MORRIS.** T. T. 1801. N. P. K. B. 4. Esp. 41.

Per Holt, C. J. If the husband turn away his wife he must send credit with her for reasonable expenses.

If the husband abandon his wife

2 **THOMPSON V. HERVEY.** H. T. 1768, K. B. 4 Burr. 2178. S. P. **RAWLYNS V. VANDYKE.** M. T. 1800. K. B. N. P. 3 Esp. 220.

Or if, after having been absent from home, she return, and he shut the door against her;*

On a motion for a new trial, in an action against the defendant for necessaries furnished to his wife at Bristol, in which there had been a verdict for the plaintiff, it appeared, from the evidence given at the trial, that the wife had a pension during pleasure, from the crown, determinable at the will of the king, of 300*l.* a year, granted to her in her own name, but not by any agreement, or otherwise, appropriated at all to her own use; that at her return from Bristol, the defendant, her husband, shut his doors against her; that he had never made, or agreed to make, any separate allowance to her, or had contributed

* Or if by bringing another woman under his roof he renders his house unfit for the residence of his wife, who, thereupon, removes and lives apart from him, he is bound to provide her with necessaries. **Aldis v. Chapman,** MS. 1 Selw. N. P. 275.

any thing towards her support since he had so shut his doors against her; nor had she any use of his table, servants, or equipage, and there was evidence of his being reputed to have an income of about 1,800*l.* per annum. The Court were extremely clear that the husband was liable to this action, and that the verdict obtained against him ought not to be set aside. There was no agreement they said, for a separation; but he has sent her adrift by shutting his doors against her. As she had no admittance into his house, she was obliged to procure lodging and maintenance somewhere else. Every man is obliged to maintain his wife. The pension is only a voluntary grace and bounty of the crown; not what every creditor of hers, even for her necessary subsistence suitable to her degree and rank of life, can be supposed to give her credit upon. Rule discharged.

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Or where a deed of separation has been executed by husband & wife, but not by the trustee appointed on her behalf, and consequently void, and he refuses to receive her into his house;

3. *EWERS v. HUTTON*. M. T. 1800. N. P. 3 Esp. 255. *Assumpsit* for necessities for defendant's wife. It appeared defendant had treated his wife with great cruelty, and turned her out of doors, and that, on her soliciting to be received again, the defendant refused to do it. Defence, that defendant secured her an annual allowance by deed, executed by himself and wife; but it appeared, the wife's trustee, who was a party to it, had not executed it. Lord Eldon said, if a wife is compelled to leave her home, to avoid ill-treatment and cruelty, or is turned out of doors, any person who grants her an asylum, and furnishes her with necessities correspondent with the husband's rank in life at the time of separation, may recover the amount from the husband. As to the deed of separation, that must be considered as mere waste paper, as the wife could neither execute the deed or covenant with the defendant, unless by means of her trustee, who had not executed the deed. The defendant, therefore, could not be sued upon it, it was consequently a mere nullity.—Verdict for plaintiff.

Or if he ill treat or refuse to cohabit with her, will be liable for necessities furnished to her, altho' he caution the plaintiff individually,

4. *BOULTON v. PRENTICE*. Cited 1 Selw. N. P. 275; S. C. 2 Stra. 1214. S. P. *HARRIS v. MORRIS*. T. T. 1811. N. P. 4 Esp. 41. S. P. *ROBINSON v. GOSNOLD*. E. T. 1703. 6 Mod. 171; S. C. 1 Salk. 119.

Assumpsit for goods sold and delivered to defendant's wife. Verdict for plaintiff. On motion for a new trial, it appeared that defendant and wife had formerly lodged at plaintiff's house, during which time the defendant had given plaintiff express notice not to trust defendant's wife. Afterwards defendant and his wife went to lodge at another place, where defendant used his wife ill, after which they separated, and defendant refused to receive her again. She desired him to maintain her, and offered to return and cohabit with him, which he refused, and struck her, and declared that if any person trusted her, or gave her credit, he would not pay them. She had not any clothes, and was wholly destitute of necessities. The goods furnished to her by plaintiff were necessities, and suitable to the condition of the wife. On the part of the defendant it was proved, that defendant's wife used to pawn her clothes, and was addicted to drinking; that plaintiff had assisted her in pawning her watch; and that defendant, a year before they parted, had expressly forbidden plaintiff from trusting defendant's wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is, in law grounded on the supposed assent of the husband, which assent cannot be supposed, where, as in this case, there is an express prohibition. But it was answered, and so resolved by the Court, that although the prohibition took effect, and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away, and refused to maintain her; for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might, *pari ratione*, prohibit many; and this might be extended so far as to deprive the wife from any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for her contracts. It is the cohabitation which is considered as the

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evidence of the husband's assent to the contracts made by his wife for necessities; but if the husband, during the cohabitation, declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent, trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption; and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities which have been provided for her.

5. *HAREIS v. MORRIS.* T. T. 1801. N. P. 4 Esp. 41.

Assumpsit for necessities furnished to defendant's wife. It appeared in evidence, that the defendant had turned her out of doors, and that the plaintiff from feelings of humanity, took her under his roof, and furnished her with the necessities for which the present action was brought. Defence, that he had advertised her in the newspapers, cautioning the public not to trust her on his responsibility. Lord Kenyon held, that if a man turns his wife out of doors, although he cautions the public not to give her credit, he shall be liable for necessities; for the law says, that where the husband turns her out of doors, he sends her with credit for reasonable expenses.

Or the public generally not to trust her.

6. *HORWOOD v. HOFFER.* E. T. 1811. C. P. 3 Taunt. 421.

This action was for necessities furnished to a feme covert, the wife of the defendant, who had quitted her husband's house on account of alleged ill-treatment; to support which it was proved, that the defendant had cohabited with another woman in the same house, and had confined his wife, under a pretence of insanity, in her own room, whence she escaped, and obtained the necessities, which were the subject of this action, from the plaintiff. The plaintiff was nonsuited; and on motion to set it aside, the Court said, that as a wife has her remedy by suit for alimony or divorce, nothing less than absolute personal violence and injury would justify a wife in leaving her husband's house.—Rule refused.

But nothing less than personal violence towards the wife will justify her in leaving his house, so as to make him responsible for necessities supplied to her.

7. *HODGES v. HODGES.* H. T. 1796. N. P. 1 Esp. 442.

Assumpsit by plaintiff to recover a sum of money for the board and maintenance of his mother, who had been compelled, in consequence of defendant's ill-treatment, to leave her home. It appeared in evidence, she left her home from an apprehension of ill-treatment. Defendant's counsel insisted, that where a wife voluntarily quits her husband's house, the husband is not liable for necessities. But Lord Kenyon said, where the home of the wife is rendered unsafe from his ill-treatment, it is equivalent to turning her out of doors, which renders the husband liable for necessities.

For example, where she is so ill treated as render it unsafe for her to live with him.

8. *SHEPHERD v. MACKOUL.* H. T. 1813. K. B. N. P. 3. Campb. 326.

The defendant having ill-treated his wife, it became necessary for her to exhibit articles of the peace against him, for which purpose she employed the plaintiff, an attorney, for the recovery of whose bill this action was brought.

Lord Ellenborough, C. J. said, if the exhibiting of the articles of the peace had appeared to be uncalled for, I should have held this action not maintainable; but as she had a right of appealing to the law for protection, she must have the means of doing it effectually, and by necessity her husband is chargeable for the expenses, as much as for any other necessities.

The husband is liable for costs,* if he compel his wife to exhibit articles of the peace against him.

3. *By voluntary departure of the Wife*

MANBY v. SCOTT. T. T. Ex. Chamb. 1 Lev. 4; S. C. 1 Sid. 109; S. C. 1 Mod. 124; S. C. 1 Keb. 69; S. C. 1 Bac. Ab. 296; S. C. Bridg. Rep. 253.

The wife of the defendant went away from him without his consent; during the separation, the latter, who did not allow the wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife; notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action

A tradesman who supplies a woman who has voluntarily left her husband after notice not

* So where the wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence, it was holden that he was liable to an attorney whom she had employed to defend her; *Shepherd v. Mackoul*, 3 Campb. 326.

to do so, against the husband for the value of the goods. At the trial the jury found that does it in the goods were suitable to the degree of the husband; and after three arguments in the Court of King's Bench, the judges were divided in opinion, where- wrong; and upon the case was adjourned into the Exchequer Chamber, where nine judges the husband can- held that the husband was not liable; The wife having voluntarily relinquished not be sued. her claim to support from him, by having removed herself from her husband's residence.

A husband is not liable for provision furnished his wife without his consent by the gaoler of a prison where she is confined.

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4 *By imprisonment of the Wife.*

CALVERLY v. PLUMMER. T. T. 1670. K. B. 2. Lev. 16. S. P. FOWLER v. DINELEY. M. T. 1739. K. B. 2. Stra. 1122.

In assumpsit against the defendant for board and lodging for his wife, while under the plaintiff's care as a gaoler. It appeared that the defendant left his wife in the country, and came to London, and married another woman, for which he was indicted, and his wife came to London to prosecute, upon which he caused her to be arrested, and she was committed to the custody of the plaintiff.

Per Hale, C. J. The defendant is not chargeable, without some evidence of his consent; such as he visited her in prison, or by some other act approving of the provision made by the plaintiff. But exactly the reverse appears, as she came to prosecute him, and he was convicted, and obtained his clergy upon her prosecution; if he would not allow her necessities, she ought to have applied in due course of law for her maintenance. Plaintiff nonsuited.

(f) *For necessities obtained by her after a divorce in the Ecclesiastical Court.*

ANSTAY v. MANNERS. M. T. 1818. C. P. N. P. Gow. 10.

The liability of the husband for debts of his wife, does not continue after a sentence of nullity of marriage.

In an action for goods sold and delivered, it appeared that in 1811 a sentence of nullity of marriage was pronounced in the Ecclesiastical Court, and the defendant separated from her husband. A small portion of the goods in question were supplied before the sentence, but the greater part had been sold after that time; the goods were entered in the plaintiff's books as sold to the defendant, and not to her husband. On the question being raised, whether she was liable for the goods supplied before the sentence, Park, J. determined in the affirmative, but said that the liability of a husband for the debts of his wife, did not continue after a sentence of divorce, and that from that time, he was in no respect answerable. *Sed vide Lewis v. Lee, 3 B. & C. 291; S. C. 5 D. & B. 98.*

(g) *On deeds executed by her.*

WHITE v. CUYLER. H. T. 1795. K. B. 6 T. R. 176; S. C. 1 Esp. 200.

Where a wife has executed a deed without her husband's authority, the latter may be sued upon the implied simple contract.

By articles of agreement under seal between the defendant's wife and L. and the plaintiff, the defendant's wife agreed to take the plaintiff with her abroad as a servant, to pay her certain wages as long as she continued in her service and the expenses of her passage home to England, in case of a dismissal, the defendant's wife not having paid the plaintiff's passage home according to the covenant, brought an action of assumpsit against the defendant. The defendant objected that the action was misconceived, for that the plaintiff should have sued upon the deed. But the Court were of opinion that the action would lie, The covenant by the wife could not bind her husband, she having no authority to bind him by deed.

(h) *For torts committed by her.*

The husband is answerable for all the torts and trespasses committed by the wife during coverture; 1 Fac. Ab. tit. Baron and Feme, L; and for which they must be jointly sued for penalties incurred by her under a penal statute.

(i) *For crimes committed by her.*

REX v. TAYLOR. E. T. 1765. K. B. 3 Burr. 1679.

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The husband is, in no case, amenable for the criminal acts of his wife,

The defendant was brought up by habeas corpus from Lancashire, having been committed to the house of correction for disobeying an order of two justices, "adjudging her child to be a bastard, and ordering her to maintain it, by paying 8d. a week, for so long a time as the child should be chargeable to the parish;" there to remain without bail or mainprize, except she shall put in sufficient surety "to perform the said order, or else, &c. or be otherwise dis-

charged by due course of law." She was unmarried when the child was born, and he need not be included in the prosecution. but was now married to Taylor; two objections were taken; 1st, that the justices had no power under the stat. 18 Eliz. c. 3. to make this order of maintenance, she being then a married woman, and incapable of having any property; besides, the husband ought to have been summoned; 2dly, that by the 18 Eliz. the justices are obliged to commit to the common gaol, and here it was to the house of correction.

Per Cur. A feme covert is liable to be prosecuted for crimes committed by her; this woman has disobeyed the order of the justices; and the 18 Eliz. c. 3. prescribes the punishment here inflicted upon her; there is no need to summon the husband in a criminal prosecution against the wife; 2dly, it is within the 6 Geo. 1. c. 19. s. 2. which authorises the justices to commit vagrants and other criminal persons, charged with small offences, either to the common gaol or house of correction; for she is committed for an offence, and for want of sureties; it is therefore within the provisions of that act, and a legal commitment; and it is better for her than a commitment to the common gaol. All offences are personal, and no change of the offenders circumstances can discharge her; the husband was no object of the law.

(j) *For money paid by a third person for her funeral.*

JENKINS v. TUCKER. M. T. 1788. C. P. 1 H. Bl. 90.

The defendant, after marrying the plaintiff's daughter, went abroad, leaving her in England, and during his absence she died, and after her death, the plaintiff, her father, expended money in discharging her debts and maintaining her child in a manner suitable to her husband's fortune, and in defraying the expenses of her funeral, brought this action for money had and received, to recover the same. The declaration was for necessities and funeral expenses, with the usual money counts. The defendant paid money into court, and pleaded non assumpsit as to the residue.

Per Cur. We think that the debts of the deceased cannot be recovered; but we are unanimously of opinion that there is a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in the honorable discharge of a duty which the defendant was under a strict legal necessity himself of performing, and which common decency required at his hands; the money, therefore, which the plaintiff paid on this account, was paid to the use of the defendant. Judgment for the plaintiff. See 5 Bl. Rep. 1117; 2 H. Bl. 254.

(C) OF THE INTEREST AND POWER ACQUIRED BY THE WIFE BY THE MARRIAGE.

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1. IN THE PERSON OF HER HUSBAND.

(a) *To enforce cohabitation.*

We have already seen that the indissolubility of marriage is such, that the husband by suit in the spiritual court may compel cohabitation, and the first principles of justice require that the right should be reciprocal. This species of suit, however, may be instituted greatly to the prejudice of an already injured husband; indeed, instances are not wanting where a wife, after a formal declaration occasioned by her own misconduct, has, with the mere intention of giving weight to a demand for an increased allowance, instituted a suit for the restitution of her conjugal rights, alleging that her husband had withdrawn himself from her society without lawful cause; but on the other hand this right to enforce the duties incident to the matrimonial contract is attended by advantages which more than counterbalance any occasional abuse of the privilege it affords; for it places within the power of an innocent wife, an effectual protection against the extreme consequences which an unfounded calumny might produce by its operation on a credulous jealous mind, as it enables her to put an unprincipled husband to the proof of whatever malicious accusations he may think fit to publish to the world in palliation of the wanton desertion of his family, or as a pretext for withholding that maintenance to which every wife is *prima facie* entitled, in proportion to the fortune and rank of her husband; Poynder on Marriage.

(b) *To protect her husband from injuries.*

In a former volume (vol. 2. p. 376.) it has been shown that an assault may be justified by a wife in defence of her husband; but she cannot recover damages for an injury to the person of her husband, for she in law has no separate interest during her coverture.

2. IN THE PROPERTY OF HER HUSBAND.

(a) *Rights of wife in her husband's chattels real.*

The marriage transfers to the wife no legal or equitable interest in her husband's chattels real.

(b) *Rights of Wife in her husband's chattels personal.*1. *In general.*

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The husband is entitled to the absolute power and unlimited controul over his own personal estate, *Manby v. Scott*, Bridg. Rep. 257. and if he make a will disposing of the whole of it to others, however arbitrarily or capriciously, the wife cannot claim any part of the property in opposition to such a disposition. The only interest she possesses in his effects is under the statute of distributions (22 & 23 Car. 2. c. 10. made perpetual 1 Jac. 2. c. 17. s. 5.;) this act confers upon the wife, if she survive her husband, who dies intestate, leaving children, and without having made any settlement upon the marriage to the prejudice of her right, one third part of his personal estate, and if there be no child, then to a moiety. This share to her husband's personal estate may be augmented by particular custom. See post, tit. Distributions, statute of "London, York."

2. *Of her pin-money.**

Although, as will be hereafter shown, transfers of property by the husband to the wife are void at law, yet they will be supported in equity, (*post*) when the transaction is *bona fide*, and not intended as a cover for fraud, nor such an unreasonable act as to prevent that court's interference; *Beard v. Beard*, 3 Atk. 72; hence gifts by the husband to his wife for clothes, or to purchase ornaments or for her separate expenditure, will be good in equity. Such gifts are known by the name of pin-money, and may be either a yearly allowance settled upon the wife before marriage, or gratuitous gifts or payments from time to time by him to her afterwards. When such a settlement is made previously to the marriage, it will not only be binding upon the husband, but also upon his creditors.

If an annual sum be secured for the wife's pin-money, for her apparel and expenses, and the husband and wife cohabit together, and the husband maintains her, the arrears of pin-money are not recoverable, (*Thomas v. Fennet*, 2 P. Wms. 541; see 3 id. 353.) beyond the year (2 Ves. 190); for in such case she is supposed to have been satisfied; but if the wife lives separate, and has no allowance, an account of arrears of pin-money will be decreed. (*Aston v. Aston*, 1 Ves. 267.) But if she has pin-money secured by a term, and runs away and lives in adultery, and the trustees proceed at law, to recover the term, it seems they may be restrained; but if she left her husband on account of ill usage, or other reasonable grounds, or the husband acquiesced in her departure, courts of equity will not interpose. *More v. Scarborough*, 2 Eq. Abr. 156.

3. *Of her allowance for keeping house, &c.*

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This is a species of allowance to the wife by the husband, somewhat analogous to pin-money. It occurs when he permits his wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries; or when he makes to her a yearly allowance for the keeping of his house. The profits in the first case, and the savings in the other, will in equity be considered as the wife's own separate estate, although at law they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband. (*Sir Paul Neale's case*, cited in *Herbert v. Herbert*,

* See observations on this subject, *Spectator*, No. 295. Lord Eldon, in *Wheatley's case*, MS. 1804, cited 1 Mad. Eq. 439, n. said I detest pin-money, and have a strong prejudice against it.

Pre. Ch. 41; 3 P. Wms. 337; 2 Eq. Ca. abridg. 156.) These savings being deemed the separate property of the wife, she may either bequeath them by will as a feme sole, or dispose of them in her life-time; Pre. Ch. 44; 2 Vern. 535.

4. *Of her paraphernalia.**

The articles comprised under the term of paraphernalia include such apparel and ornaments of the wife as are suitable to her condition in life. What are to be so considered are questions to be decided by the Court, and will depend upon the rank and fortune of the parties. *Bindon's case*, Moor. 213; 2 Leon. 166; Cro. Car. 343; 1 Rol. Ab. 911; Pre. Ch. 27. Pearls and jewels usually or sometimes worn by the wife, or gold rings given to her at the funerals of relations; 2 Eq. Ca. Ab. 156; properly fall within this term; 1 Rol. Ab. 911; 3 Atk. 394. Of such presents or of her other paraphernalia, a wife cannot dispose by gift or will during her husband's life. Nor can he dispose of them by will during her life, although he may sell or give them away; 1 P. Will. 730; *Wilcox v. Gore*, 11 Vin. Ab. 180. pl. 19; 2 Atk. 78; *Seymore v. Tresilian*, 3 Atk. 358. 369; and with this and the cases in equity agree the opinions of *Berkley and Jones, Justices*, in *Hastings v. Douglass*, Cro. Car. 344. If then the husband bequeath all his wife's jewels, &c. to some of which she is entitled as paraphernalia, the disposition will be disappointed so far only as regards the latter jewels. And when such a general disposition is made, the only difficulty is to ascertain what shall be considered paraphernalia, and what not.

Paraphernalia is not allowed against creditors; 2 Ves. 7; except when given by a stranger; 3 Atk. 393; but is preferred to legacies; *Tipping v. Tipping*, 1 P. Wms. 729; *Snelson v. Snelson*, 3 Atk. 369; and the assets may be marshalled; 2 P. Wms. 542; and where a wife's paraphernalia had been exhausted in payment of her husband's debts, upon the deficiency of personal assets, though the Court could not decree satisfaction out of the real estates devised, yet it was decreed out of the real estates descended; *Amb. 6*; *Probert v. Clifford*, Reg. Lib. fo. 310; 3 Atk. 369; *vide* 2 P. W. 544. n; nor is a wife barred of her paraphernalia by a bequest of furniture, plate, and linen, &c. for her life; 2 Atk. 217. *Marshall v. Blew*; nor her claim disappointed by the effect of the option of a creditor having a double fund to resort to in administration of the assets; 8 Ves. 397. *Aldrich v. Cooper*. And if a husband pledges his wife's paraphernalia, his personal estate if sufficient, shall be liable to redeem them; 3 Atk.

5. *Of alimony on a separation.*

ANON. H. T. 1631. K. B. 2 Shower. 282. S. P. admitted in *MANBY v. SCOTT*.
Bridg. Rep. 251.

On a suit for alimony, the Court were of opinion that there formerly being no spiritual courts, nor civil law, the Chancery had the jurisdiction. But since there are courts of Christian, the Chancery ought to allow a demurrer to a bill for alimony. See 2 Vern. 493; Lit. 73; Ch. Rep. 41. 164. 187. 224; 2 Com. Dg Chancery, 2 D; 1 Mod. Eq. 385. n. l.

* In the civil law they are thus described:—*Esse paraphernalia sunt quæ mulier ultra dotem adfert, et de his bonis maritus administrationem habet ita ut sine speciali uxoris administrationem habet, ita ut sine speciali uxoris mandato et agere et convenire possit; Minsing on the Institutes, p. 97.*

† And courts of equity will not enforce an agreement for a separate maintenance where the contract rests in articles between the husband & the wife, the spiritual court being considered as having exclusive cognizance of the rights and duties arising from the state of marriage; see Ch. Rep. 44; 1 Ves. 17; S. C. 3 Atk. 50; 3 Merv. 268; 3 Bro. 614; 2 Atk. 511; 2 Cox. 99; 3 Ves. 361. 11 Ves. 532; 2 Dick. 791. But though the Court of Chancery cannot decree alimony, or a separation, yet it can enforce articles of separation voluntarily entered into between the parties; *Gilb. Eq. Rep. 142*; *Angier v. Angier*, Pr. in Ch. 496. And where a wife filed a bill for performance of an agreement, and for alimony, she being compelled, by her husband's cruelty, to leave him, the Court decreed her 500*l.* to carry on the suit; *Dick. 498*. *Yeo v. Yeo*. So where a husband by force compelled his wife to execute a deed of separation, allowing a maintenance inferior to her rank and fortune, equity will decree proper maintenance; 6 Br. P. C. *Lambert v. Lambert*. By deed executed before marriage, it was agreed, that if any separation should take place by the de-

[65]
Suits for alimony must be instituted in the spiritual courts.†

A court of law has extended its protection [66] to the wife against her husband, even where no trustees [67] were appointed in the deed, by which her title to separate property was creat-

(D) OF HER POWER OVER HER OWN OR SEPARATE PROPERTY.*

1. DAVISON V. ATKINSON. M. T. 1793. K. B. 5 T. R. 431.

The testator devised some lands, in which collieries had since been discovered, to three persons, in trust to sell for the benefit of others, of whom B. (afterwards the wife of A.) was one, and until sale the trustees were to receive the rents, and to pay a part of them to B. for her sole and separate use. The lands were not sold, and the trustees let the collieries. Before B's marriage she conveyed one-eighth part of the profits of the collieries to C. the plaintiff's wife, (not to a trustee for her) to her sole and separate use. The trustees in the will having notice of the conveyance to C. paid to B. her share of the rent

sire, or at the instance of the wife, then the husband should receive the moiety of an annuity which the wife was possessed of, and she should receive the other moiety without the controul of her husband; but if such separation should take place at the instance, or by the means of the husband, then the wife should receive the whole annuity. Equity will support this agreement; and if the separation appears to be caused by the means of the husband, the wife shall have the whole annuity during such separation; 2 Ridgw. P. C. 268. Hoare v. Hoare.

In the spiritual courts, alimony is that legal proportion of the husband's estate which is allotted to the wife for her maintenance during the pendency of a suit between them, or (after a sentence of divorce by reason of the cruelty or adultery of the husband) the permanent allowance to be paid by the husband to the wife during the period of their separation.

In all suits of divorce, or suits for the restitution of conjugal rights, or in suits of nullity (if the nullity be promoted by the husband), as soon as the Court is judicially informed that a fact of marriage has taken place, it is competent to the wife to apply for alimony pending the suit. The quantum of alimony to be assigned depends on the discretion of the Court; and when the sum is not agreed upon between the agents of the parties (as sometimes is the case), a statement of the intrinsic property, as well as of the casual income of the husband, is set forth in a plea, technically called an Allegation of Faculties, to which his answer, on oath, is required; and it is usually on that evidence alone that the Court proceeds to fix the allowance payable to the wife pending the suit, and after sentence (if she obtains a divorce), to determine on the amount of the permanent alimony, 2 Haggard. 200.

* In prior parts of this work we have seen, that, with very few exceptions, the common law will not permit the wife to take or enjoy real or personal estate separate from, and independent of, her husband. But this rule or liability has been in many instances relaxed, and it will be seen from the few cases abridged in the text, that the capacity of the wife to enjoy property separate from her husband has been acknowledged, even in courts of law.

The interposition of trustees, seems at first to have been essentially necessary, in order to protect the wife's separate interest; 1 P. Wms. 125; 2 id. 19; and regularly, where property is intended to be given or settled upon married women for their separate use, it ought to be vested in trustees; Barnb. 187. 206; see *post* "Marriage Settlement;" but it has now been long established, that if land or personality be devised or settled to or upon a married woman, for her separate use, without the precaution of vesting it in trustees, still in equity the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her; 2 P. Wms. 316; 9 Ves. 583; id. 375; and this principle of equity still more strongly applies when the estate is given to the husband for her separate purposes; 3 Atk. 399; 9 Ves. 369; and the trusts will be enforced against his assignees in bankruptcy, and under the insolvent debtor's act, and against trustees under a conveyance from the husband to pay debts. But the title of a purchaser from the husband, without notice of the trust, will not be disturbed; 9 Ves. 583.

The following list of expressions, respecting which questions have been raised, whether they are sufficient to create a trust for the wife's separate use, may be found of some practical value:

"To the wife's sole and separate use," clearly suffices to create a separate interest; Coop. Rep. 283; 1 Mad. 199; or that she shall *enjoy and receive* the issues and profits of a moiety of the estate; 2 Atk. 558; or that the bequest is given for the livelihood of the wife; 3 Atk. 399; or that her receipts shall be a sufficient discharge; 3 Bro. C. C. 382; or that the money be paid into her own hands; 5 Ves. jun. 540; or that the securities for the money shall be given up to her by the executors on demand; 2 Cox. Rep. 414. On the other hand, these words have been holden, not to protect the property from the husband's control; that A. B. shall purchase in his own name an annuity of 80*l.* for the life of C. D., and to pay the same to her and her assigns; 1 Ch. Ca. 194; 3 Ves. 166; 5 Ves. 517. n; or a direction that the money shall be paid to her, and for her use, during her life, or to and for her own use; 3 Bro. C. C. 373. by Belt

Femes covert having separate estates are as to such estates considered as *femes sole*; 3 Br. P. C. Freeman v. More, 378; 3 Br. Ch. Ca. 8 Fettiplace v. Gorges; therefore, whether a power of disposal be vested in them; 13 Ves. 190; 9 Ves. 520; by the deed creating

under the will. C's husband brought an action of *assumpsit* against the husband of B. to recover one-eighth part of the rent, upon the ground that as no trustee was appointed for the plaintiff's wife, in the conveyance made to her, it was in law a conveyance to the husband, who alone had the right to sue for the money. But the Court held that the trustees under the will, in whom the legal estate was vested, were to be considered as trustees for C. the plaintiff's [68]

such estates, or not, they absolutely dispose of such estates, or of money saved out of them; 2 Vern. 535; Gore v. Knight, 3 Atk. 709; Hearle v. Greenbank, 1 Ves. 303; 1 Eq. Abr. 346. pl. 18; and this without examination; 13 Ves. 190; or joining trustees; 1 Ves. 517. Grigby v. Cox; 14 Ves. 547. Essex v. Atkins. Real property too is subject to such disposition, as well as personal; 6 Br. P. C. 156. Wright v. Cadogan; and personal estate to the wife's separate use for life, and after her death to such person as she should by will appoint, or in default of such appointment to her executors, seems to give her the absolute disposal during life, for personal property, limited to one and his executors, is as absolute as land to one and his heirs; and the case of Socket and Wray, 4 Br. C. C. 488, seems overruled by that of Heatly v. Thomas, 15 Ves. 596; see also Anderson v. Dawson, 15 Ves. 536; Bradley v. Peixoto, 3 Ves. 325; 3 Ves. 299. Hales v. Margerum.

Where then the wife has assigned her separate property, the assignee may have the trust executed in equity; but a general creditor, it has been thought, cannot in equity be paid out of that property; neither will equity, in general, make good a contract against a married woman on which she cannot be sued at law; 2 Ves. jun. 150. 156; Duke of Bolton v. Williams, 4 Br. Ch. Ca. 309. 311. However, a woman having a separate estate will be bound to a specific performance, unless there be proof of fraud or undue influence on the part of the husband; 3 Br. Ch. Rep. 340; Pybus v. Smith, 1 Ves. jun. 189; and it has also been determined, that a court of equity will compel her heir to convey to the party in whose favour an agreement has been made; 6 Br. P. C. 156. Wright v. Cadogan; Rippon v. Dowding, 4 Anl. 565. And where a married woman agreed to pay her landlord an additional rent out of her separate estate (without the knowledge of her husband), in consideration of greater repairs, a bill by the husband, filed for a return of the money, and suggesting a fraud on him, was dismissed; 2 Br. Ch. Ca. 19; Masters v. Fuller, 1 Ves. jun. 513. The bond too of a *feme covert*, as a surety, was enforced against her separate estate; 15 Ves. 596. Heatly v. Thomas; and where *feme covert*, having separate estate, borrowed money on bond, and died ten years after, it was decreed the bond should be satisfied out of the wife's assets left by will, although the husband insisted on the statute of limitations; 2 P. Wms. 144. Norton v. Turville. It has been likewise holden, that the separate property may be applied to the discharge of a bond given by the wife before marriage; but this was where the husband had absconded, so that he could not be served; for before that occurrence, the plaintiff's first bill against the wife's separate property was dismissed; 1 Br. Ch. Rep. Briscoe v. Kennedy, cited.

Also if a *feme covert* having separate property borrows money, and executes a bond; Balkin v. Clark; 17 Ves. 355; or enters into a bond jointly with her husband as a security for his debts, this will give a foundation to demand the money out of her separate estate; and her declarations in such cases may be read in evidence against her; 2 Ves. 190; Norton v. Turvil, 2 P. Wms. 144; Hulme v. Tenant, 1 Br. Ch. Rep. 16; Stanford v. Marshall; 2 Atk. 68; the bond, though a nullity, is evidence of her intention; per Lord Eldon, in Parkes v. White, 11 Ves. 209. So a grant of an annuity by a married woman out of her separate estate was established (notwithstanding notice by the trustees that they would only pay to the wife herself): the transaction, though for her husband's benefit being her deliberate act when aware of what she was doing; 14 Ves. 542; Essex v. Atkins, 9 Ves. 520.

On a review of all the authorities, it seems that a *feme covert* having a power of disposition over it, may give her estate to her husband, as well as to any one else, however formally and strictly it may be limited to her separate use; 11 Ves. 209. Parkes v. White.—But though the cases never intended to forbid this; where the husband behaves well, yet it is an act that the Court looks on with the utmost jealousy; Fing. 243.

A wife, without her husband, may execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; Co. Lit. 186. The rule is the same, where both an *interest* and an *authority* pass to the wife, if the authority is collateral to, and doth not flow from the interest, because then the two are as unconnected as if they were vested in different persons; Rep. Temp. Finch. 346. As too a *feme covert* may without her husband convey lands in execution of a *mere power or authority*, so may she with equal effect in performance of a condition where land is vested in her on condition to convey to others; W. Jones. 137-8. The reason why in these instances the wife may convey without her husband, seems to be that he can receive no prejudice from her acts; but a great one might arise to others, if his concurrence should be essential. Yet if the legal estate of lands is vested in a married woman on trust for another, some hold that she cannot pass it to *cestui que trust*, unless the husband joins, and therefore that if she makes feoffment or fine without him, the first will

wife, and that the husband was not entitled to recover in the action. And Lord Kenyon, C. J. observed that the interests of the plaintiff and his wife were in direct opposition to each other, and that if the Court permitted him to recover the money which was intended for her separate use, her separate right would be destroyed.

And such will be the case when the intention is considered to be sufficiently clear to raise a trust for the wife's separate use against a second husband,

2. *DEABLE V. DODD.* E. T. 1726. K. B. 1 T. R. 193.

Lands were devised to trustees in trust, to pay the rents and profits to F. for life, who was then married, or to such person as she should appoint, notwithstanding her coverture, but not into her husband's hands; with a direction that such rents and profits should not be subject to any control, management, or disposal of her husband, nor liable to any debts which he had or should contract; the same being expressed to be designed by the testator for the wife's separate use and benefit, and to be at her own disposal, notwithstanding coverture, with remainder (after inserting trustees to preserve contingent remainders) to the issue male of F. in tail, remainder to her issue female. F.'s husband died between the date of the will and the making of the codicil after mentioned, and she married G. after the testator's death. The codicil noticed the death of F.'s husband, and confirmed the will in all particulars not altered or revoked by it. Question whether, under the will and codicil, the separate enjoyment of the rents, &c. by F. was confined to the life of the first husband, or whether it was available against every future husband. And it was determined that, according to the true construction of the will and codicil, the latter expressly mentioning the death of the first husband, and still continuing the restriction, the testator intended that F. should enjoy the lands free from the control of any husband. See title *Curtsey*.

A feme covert may dispose of property in *autre droit* by will without her husband's consent.

3. *SCAMMEL V. WILKINSON.* T. T. 1802. K. B. 2 East. 552.

Per Cur. The husband's consent is not necessary to the validity of the wife's will of property which she has in *autre droit* as executrix. Vide *ante*, 39 and 41.

4. *SCAMMEL AND OTHERS V. WILKINSON AND ANOTHER.* T. T. 1802. K. B. 2 East. 552.

A married woman can not by a will made during coverture, even with her husband's consent, dispose of property acquired by her after his death.

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A declaration in prohibition averred that a suit had been instituted by the defendant in an ecclesiastical court against the plaintiff, next of kin of one A. B., wife of E. F., calling upon them to leave in the registry of the said court the probate of the pretended testament of the said A. B., theretofore granted to the said defendants as executors under certain limitations, and to show cause why the same should not be revoked, and a general probate granted to the said executors; inasmuch as one C. D., since deceased, made his will, and appointed A. B. his sole executor and residuary legatee, and as E. F. had made his will, and thereby bequeathed the residue of his personal estate to A. B., and, in case of her decease during his life-time, to her executors, directing the same to be disposed in such manner as A. B. should appoint, and in such his last testament made the said defendants executors and trustees for his wife; and forasmuch as the said A. B. did with her husband's approbation execute her will, which was also attested by him, giving what she might be entitled to at the time of her decease to one of the said defendants, and appointed her and the other executors; it further appearing that E. F. died in the life-time of the said A. B., and that she died without revoking her said will; that her will was proved, and probate incautiously granted to the defendants with a limitation, to the right and interest which she took under the

be void, the latter voidable. This was the opinion of Jones, J. in *Daniel and Upley*, but Whitlock and Doddridge, Justices, dissented, and held that the husband's joining was not any more requisite than in the other cases; *W. Jones* 137. Perhaps, however, Jones's opinion may be most conformable to strictly legal doctrine, and his thus distinguishing a trust from a power, and a condition, may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts; note by Mr. Hargreave, Co. Lit. 187. b.

will of her husband; whereas she died intestate, and entitled to certain property which could not be administered under the limitations of her probate. The declaration went on to state that, in answer to the foregoing libel, the plaintiffs admitted that A. B. could not make a will but by her husband's permission; and that no such authority was granted; and that his witnessing A. B.'s will was evidence of his assent so far only as A. B. had disposed of such effects as her husband had a power of disposing of by his own will; and that her will was effectual only as to such estate as by virtue of her husband's will she had a right to bequeath. To this declaration there was a plea averring the fact of C. D. having made his will as above-mentioned, and thereby appointing A. B. his sole executrix and residuary legatee; the fact of A. B. and her husband having made their testaments as above alleged, and the fact of the assent of the latter to the dispositions made by the former, and in conclusion praying judgment and his majesty's writ of consultation. Demurrer and joinder.

Per cur. The question in this case is, whether a general probate of A. B.'s will ought to be granted. Now by such probate the following descriptions of property may pass by her will. 1st, Property of her husband's *proprio jure*. 2dly, Property derived from C. D.'s testament. 3dly, Property which may have been acquired by A. B. subsequently to her husband's death. But in the view we have taken of the case, all that species of property cannot devolve upon A. B.'s legatees, or others who might beneficially come in under her will; for although *with her husband's permission* she may transmit the first species of estate, and such part of the second as was reduced by him in his life-time into possession, and such other part of the second as was not so reduced, even without her husband's consent, yet the third description of property could not be touched or affected thereby, as her husband could give her no power of disposing of it, he never having had any interest in it, and as (she having no representative power of transmission) the validity of such part of the will must stand upon the fact of a will made by a feme covert; as to which Swinburne says, part 2, c. 9, numero 5, "Though the wife overlive the husband, yet the testament made during the marriage is not good; the reason is yielded before, because she was intestate at the time of the will making." As therefore, although a general probate should not be granted, (the consequence of it being only to give to a will made by a woman during her coverture the effect of a will made during her widowhood and discoveriture,) it is not impossible but that the ecclesiastical court may in this case grant a general probate (for by the civil law a feme covert might make a will, and so she might by the canon law;) a writ of prohibition must be issued. But as the probate formerly granted is too limited to include any power vested in A. B. to make a testament and appoint an executor of the goods she had as executrix, a probate or admission *cum scripto annexo* may be obtained, *quoad* the husband's effects and those of C. D.; which is, however, for the consideration of the proper tribunal, when an application is made to that effect. Vide Swinburne, 82; 2 Brown. 543. 4 Co. 61. b; 2 Roll. Ab. 315. b. pl. 10; Salk. 552; Lindwood, 173; *post*, tit. Will; and *post*, 73.

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(E) OF THE REMEDIES AGAINST THE HUSBAND FOR ACTUAL OR THREATENED VIOLENCE.

The case connected with the wife's right to be secured from actual or threatened violence has been already pointed out in vol. ii. p. 358, *et seq.*; it will therefore only be here necessary to state summarily that if the husband beat, (see vol. ii. p. 358,) or threaten to beat his wife outrageously, or otherwise use her ill, (see vol. ii. page 361,) she may bind him to keep the peace by application to the Court of K. B. in term time, (Fort. 359; Ca. Temp. Hard; 2 Lev. 123,) or to a justice of the peace, or by suing a writ of *supplicavit* (*ante*, vol. ii. p. 361, and Manby v. Scott, Fridge. Rep. 233,) out of Chancery; or she may apply to the spiritual court for a divorce. (*ante*, p. 21.) And we have seen (*ante*, p. 21,) that in cases of unreasonable or improper confinement, the Courts will relieve the wife on *hab. as corpus*; 1 Furr. 624,

Lord Ferrers' case. And if upon the return of the *habeas corpus* sued out by the husband to bring up the wife, it appear that he has used her ill, and she exhibit articles of the peace against him, the Court will not order her to be delivered to him; 4 Burr, 1991, Anne Gregory's case. The husband cannot seize and force to live with him a wife separated by articles entered into in consideration of money received by the husband; *ante*, p. 23.

If the husband was disabled from marrying in consequence of a previous marriage, the deceived *feme* may recover back the money obtained by him from her.

(F) OF THE REMEDY AGAINST A PERSON WHO HAS MARRIED THE FEME,

WHEN THE MARRIAGE IS VOID.

HASSER v. WALLIS. H. T. 1706-7. K. B. 1 Salk. 28; S. C. 11 Mod. Rep. 146.

The plaintiff being a *feme* sole married the defendant, who was already to another woman. He received rents as her husband. The plaintiff, discovering his former marriage, brought an *indebitatus assumpsit* against him for such a sum of money received for her use. After a verdict, on *non assumpsit* pleaded, it was objected that defendant having no right to receive, &c., the tenant was not discharged, and therefore an action might be sustained against the tenant, who had his remedy against defendant.

Per Cur. The defendant was visibly a husband, and the tenant discharged, at least the recovery against the defendant in this action discharges the tenant, because a satisfaction to the lessor.

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(G) OF THE INCAPACITY OF HUSBAND AND WIFE TO CONTRACT WITH EACH OTHER;* AND EFFECT OF MARRIAGE ON CONTRACTS MADE BY HER BEFORE MARRIAGE.

1. DOE, D. HOPSDEN, v. STAPLE. M. T. 1788. K. B. 2 T. R. 684.

A. in contemplation of marriage with B. signed a paper in writing without seal or stamp, which, after reciting the intended marriage with B. her future

If a will be made by a woman before marriage, and the husband anterior to such marriage, but after the date of the instrument agree "that she may dispose of her real estates by will" the will referred must be considered as a subsequent will, so that the agreement cannot authorize or protect the will previously made which is therefore revoked by the marriage.*

* It has been shown in a prior note, that husband and wife are as one person in law, and that upon this union depend almost all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage; and among the numerous consequences which ensue, none are more important than the rule that the husband could not, by any common law conveyance, give or grant any estate to the wife, either in possession, reversion, or remainder; and the same disability prevailed in regard to the wife; Litt. sec. 168, Co. Lit. 187; b; but an exception to this rule was introduced by the statute of uses. It was accordingly holden, that if the husband made a feoffment or conveyance, by lease and release, to A., to the use of his wife in fee, such a conveyance would be good, and the wife seized of the inheritance, and upon this reasoning, that the legal estate passed from the husband to the feoffee or releasee, out of whose seisin the statute operating upon the use limited to the wife, transferred to it the legal estate, which for a moment was in the feoffee or releasee; and thus by a subtlety evading a rule of the common law, that the wife cannot take by conveyance from her husband, and that since the statute, the legal estate must pass from the husband to another person, in order to serve the limitation of the use to the wife.

It appears from this, that the husband cannot covenant with her to stand seised to her use. At present, the wife may take an estate from her husband by limitation of an use as above, or by devise, because that does not take effect until after the marriage is determined. For the same reason, a donation *mortis causa* by the husband to her will be good. And it seems, that by the custom of particular places, as of York, the wife may take by immediate conveyance from the husband, or they may surrender copyholds to the use of each other, except the husband be lord of the manor, for in that case the grant would be immediate to the wife, which, as before-mentioned is not admissible. See Gilb. Ten. 220; Watk. Copyholds, 65. And if a *cestui que trust* devise an estate to his wife, directing her to sell the land, and appoint her his executrix, and die, and she marry a second husband, she may sell the property to such husband; the sale being made in *autre droit*, and the husband shall be in by the deviser; Co. Lit. 187. b.

* And it is well understood and universal rule, that if a woman make a will, and afterwards marry, the marriage will be a revocation of the will; first, because it was her own act in taking a husband subsequently to its date; and secondly, because the construction that marriage is only a revocation, in case the wife show her intention that it be so, might be disadvantageous to her, since the husband, by the exercise of undue influence, might oblige her to revoke or continue the will, as best suited his interest; Forse v. Frambling, 4 Rep. 61. But it has been said; Plowd, Com. 343. a; that if the wife survive her husband, the revocation or countermand of the will by marriage is done away, upon the principle that disability of marriage being removed there is nothing to prevent the will made prior to the coverture from taking effect at her death. But this doctrine is not altogether free from objection; for it is essential to the nature of a will, that it should be ambulatory,

husband, and that she was entitled to considerable real and personal property, stated, that it was agreed that her fortune should be settled to their joint use for her life, or the life of the survivor; and that if she survived, her whole fortune, together with her plate and jewels, should be settled to her own use; but that if she died first; then that her fortune should be at her own disposal; B. signed a duplicate of the paper. On the same day, A. made her will duly executed to pass freehold property, giving the interest of her fortune to B. her intended husband, and after specific devises (but not mentioning the reversion in the premises,) she gave her estate and residuary effects to B. whom she appointed executor. On the same day the marriage was solemnized, and A. afterwards died before B. without issue. The question was between B., the wife's devisee, and the heir of A. who claimed the property under the presumption that the will of A. was revoked by her marriage; and of that opinion was the Court, for as the will was made before the marriage, it was revoked, and it was not supported by the agreement, which was not a deed for want of a seal, so that it could not operate as a covenant by the husband to stand seised to uses; and Ashurst, J. observed, that the agreement referred to an executory act, and not to a will made prior to the marriage; and he said that it might have been a great doubt whether it could have been argued that the marriage should not revoke the will, even if there had been words for the purpose, because it would be a stipulation in direct opposition to a positive rule of law.

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See 1 Lord Raym. 516.

2. *CAYE v. ACTON*. H. T. 1798. K. B. 1 Lord Raym. 515; S. C. 1 Salk. 325; Carth. 511; 1 Com. Rep. 67; Holt. 309; 12 Mod. 288; Pleading Lit. Ent. 214. recognized by Lord Kenyon. 5 T. R. 381. *GIBBONS v. DAVIES*. E. T. 1692. K. B. Comb. 242.

But marriage will not destroy any prior contract between the parties upon which a right of action cannot accrue during the coverture.†

To an action for rent against an administratrix, she pleaded that the intestate, in his life-time, in consideration of a marriage to be solemnised between him and herself, became bound to her in a bond of 2000*l.* conditioned for the payment of 1000*l.* within a certain time after the intestate's death, if she survived him. She then averred that the marriage took effect, the death of the intestate, and that the 1000*l.* had not been paid; that she had taken out administration, and that the 250*l.* assets came to her hands, which she retained in satisfaction of the bond, &c. Upon demurrer Gould and Turton, Justices, were of opinion (*Holt, C. J. dissente*) that the bond was not extinguished by the marriage, so that demurrer was overruled.

and liable to be altered or revoked at any period during the life of the testator. This being so, the woman, by marrying, disables herself from making any other will, or altering or revoking the old one, so that the instrument upon the marriage ceases to fall under the essential description of a will; and, as it is conceived, must be void, whether the woman survive her husband or not; 2 Bro. C. C. 544; 2 Term. Rep. 697.

Although the husband expressly consent, before marriage, that the wife shall have power to make a will containing dispositions of her real estate, such consent will not prevent the revocation effected by the subsequent marriage; but the wife's heir-at-law will be entitled to the estate after death; Amb. 627; and *per Ashurst, J.* in *Hodsdon v. Shable*, abridged, *supra*.

In vol. ii. p. 126. it may be remembered, that the cases as to the effect of marriage upon a submission to arbitration were collected; and that it was there shown, that the marriage of a woman after submission, but before the making of the award, was a revocation of the arbitrator's authority; and that it made no difference whether the arbitrator had notice of the event or not.

† And it was upon this principle, that Lord Thurlow decided in *Fwhank v. Hallowell*, 2 Bro. C. C. 226; that a legacy given to the wife by her husband's will, made before marriage, was not revoked by marriage. But care must be taken to keep in view the difference between a suspension of the right and an extinguishment of it; in the former case, as we have seen, it has been holden, *Caye v. Acton*, and *Milbourn v. Ewart*, *supra*, the marriage does not destroy the contract; but in the latter, that is, where the right is founded upon contracts for debts which are due *in presenti*, or which may become payable at some period during the marriage, are avoided or extinguished by the intermarriage; Co. Lit. 264. b; Hob. 216; Cro. Jac. 571; Cro. Car. 376;) hence, if the obligor in a bond conditioned for the payment of money during the coverture, marry the obligee, the debt is released; so in any case, if a creditor marry his debtor, the claim and remedy thereon is extinguished; or a feme be warden of the Fleet and she marries a prisoner, he then becomes free; 2 Vent, 19

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Hence a bond conditioned for the payment of money after the obligor's death made to a woman in contemplation of the obligor marrying her, and intended for her benefit if she should survive, is no release by their marriage.*

3. *MILBOURN v. EWART*, M. T. 1703. K. B. 5 T. R. 381.

To an action of debt on bond executed by M. the late husband of the plaintiff, the defendants (who were the heirs at law of M.) after craving over of the condition of the bond (which was for the payment of 500*l.* by the heirs or executors of the obligor to the plaintiff, her executors, &c. at the expiration of twelve calendar months after the death of the obligor,) pleaded, that after the making of the writing obligatory, to wit, on such a day, the obligor intermarried with the plaintiff, who then and there became and continued covert of the obligor until his death. The plaintiff replied, that the bond was made in contemplation of the marriage, and with an intent that, if the marriage should take effect, and the plaintiff survive, she should have the benefit of it. The defendant demurred generally; and in support of the demurrer argued, that by the marriage the bond was extinguished; that the agreement mentioned in the replication was matter in *pari*, and could not be let in against an express deed; that the replication did not even state that there was an express agreement, but only that the bond was given in contemplation of marriage, and that no issue could be taken upon the contemplation with which the act was done. But the Court were of opinion that the facts disclosed by the replication supported the declaration, and were perfectly consistent with the bond, which was read was not extinguished by the marriage.

4. *MANNING v. THOMPSON*, M. T. 1730. C. P. Willes, 150. S. E. RUSSELL v. GODFREY, M. T. 1686. K. B. T. Raym. 483; 5 T. R. 206 p. 7; 2 Show. 403; Skin. 211. *LOONE v. CASEY*, H. T. 1773. C. F. 2 Rep. 965. *THOMPSON v. WOODS*, E. T. 1703. K. B. 8 Salk. 5; S. C. 5 Lev. 218.

And if the widow be executor to her husband, she may out of the assets retain the sum of money conditioned to be paid by the bond.

Debt against a widow, the executrix of her husband, by one of his bond creditors; and it appears from the widow's plea, that prior to the marriage her husband gave a bond to two trustees, conditioned to leave to her at his death, if she survived him, 10*l.*; that the marriage took effect; that he appointed her executrix of his will, which she proved; and that the debt was due. She then pleaded *plene ad satisfaciendum*, which she insisted upon retaining in part satisfaction of her bond-debt. The plaintiff demurred; first, because the bond being made to trustees, the widow could not retain, since the money was not a debt due to her at law, but to the trustees. The Court, however, over-ruled the objection, observing, that if the money had been directed to be paid to the trustees, it would have been fatal to the plea; yet, although in that case she could not have been retained, she might have paid the money to the trustees, and insisted, upon the payment or she might have paid it out of her own money, and have retained assets *pro tanto*; Dr. 2. a. 2 Rol. Ab. 634. pl. 11, *Cleveland v. Spencer*, Moor. 2; but that since, by the condition of the bond, payment was to be made to the widow, she was entitled to retain; T. Raym. 483; 2 Show. 403; Skin. 211; and whether the words were to leave or to pay to the widow would make no difference, 2 P. Wms. 203; 2 Elac. Rep. 965.

See ante, 12.

5. *ANON*, H. T. 1701. K. B. 1 Salk. 117.

A warrant of attorney was given to confess judgment to a *feme sole*, who afterwards married. The Court gave leave to enter up judgment, notwithstanding.

Marriage is not revocation of a *feme's* acceptance of a warrant of attorney to confess judgment.†

* And the same rule would apply to covenants, or any other contracts entered into by the husband with his intended wife, regard being had to the distinction before noticed, *ante*, p. 72, n.; and see 1 Id. Raym. 517; and in all cases, when, previously to the marriage, a bond is given by the husband to a person in trust for his intended wife, so that she is *cestui que trust* of such bond; or if she, *feme sole*, lend money, and take a bond in the name of the trustee, marriage will not in either case revoke it; for in both cases the legal right to sue is in the trustee, and there is no inconsistency between the right of action, and the law arising out of the relation of marriage; Cotton v. Cotton, Pie. Ch. 41; Gibbons v. Davies, Comb. 242.

† But we shall see hereafter that a warrant of attorney given by a *feme sole*, is revoked by the marriage, and judgment cannot be entered thereon. And in *Blunden v. Baugh*, Cro. Car. 304, it was holden, that where a woman lessee at *will* marries, or where a single woman grants a lease at *will*, and then takes a husband, although she has placed the will in his hands, yet the marriage shall not be considered a determination of it, without

ing the marriage, for such an authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage, like a grant of a reversion to a *feme sole* who marries before attornment, yet the tenant may attorn afterwards.

6. *MARDER ET UX. v. LEE*. E. T. 1764. K. B. 3 Burr. 1469. S. P. *REYNOLD v. DAVIES*, E. T. 1699. K. B. 12 Mod. 383. Salk. 393. *ANON.* M. T. 1772. L. R. 329.

* Upon a motion to set aside a judgment and writ of *fiery facias*, executed thereon, at the suit of baron and feme, it appeared that the defendant had entered into a warrant of attorney to confess a judgment to the *feme dum sola*, who afterwards married, and the judgment was entered by the *baron* and *feme*. The question was, whether the judgment so entered was regular or not. The Court declared their opinion to be, that the judgment was irregular for want of a previous leave of the Court to enter it up. They held that in order to warrant this entry of the judgment, there ought to have been an application to the Court for leave to enter it up, thus founded, upon a proper affidavit, proving the marriage between the plaintiff, upon which a rule of Court should have been obtained, giving leave to enter up a judgment accordingly. The rule was subsequently made absolute but without costs. See 4 Vin. Ab. 92.

But if judgment be entered up on such an authority leave of the Court, it is irregular, and will be set aside.*

(H.) OF THE DISABILITIES TO WHICH THE WIFE IS RENDERED SUBJECT BY THE [75]
MARRIAGE.

1. WITH REFERENCE TO THE DISPOSAL OF HER PERSON.

In a prior page, ante, 21, it has been shown, that the husband is entitled to the custody of the person of his wife; and that he is entitled to impose upon her such a degree of restraint, as may be necessary for the purpose of enforcing marital obedience, and preserving her inviolate; it will, therefore, only be necessary to add, that during her coverture with one man, she cannot be wedded to another individual, without being guilty of an offence punishable by the criminal law. See post tit. Polygamy.

2. WITH REFERENCE TO HER INABILITY TO MAKE OR DISCHARGE CONTRACTS.

1. *SMITH v. PLOMER AND ANOTHER, SHERIFF OF MIDDLESEX.* E. T. 1812. K. B. 15 East. 607.

The owner of goods hired out to a *feme covert* living apart from her husband does thereby divest himself of the present right of property in such goods, since the contract of hiring is void.

A married woman resided separately from her husband, under a deed of separation, securing to her, as was presumed, a proper separate maintenance. She had been supplied by a tradesman, the plaintiff, with goods and furniture upon hire, but no sum was agreed upon, nor had any period been fixed during which the goods and furniture were to continue on hire. These articles were taken in execution by a creditor of the husband; but before a sale, the plaintiff gave notice to the defendant, the sheriff, that they were his property; and that was the question in this action of trover, which the plaintiff brought against the sheriff, to obtain possession of them. The Court held that the tradesman was entitled to recover the goods upon the principle that the wife could not make a contract for the hire of them; and the Court observed, that a contract, to be valid, must bind both parties; but that this agreement, being by a married woman, could not bind her, so that the property in the goods never having divested out of the plaintiff, he had a right to recover possession of them. See 7 T. R. 9.

2. *BARLOW v. BISHOP.* E. T. 1801. K. B. 1 East. 432.

So if a bill be made payable to a *feme covert*, though her husband permit her to trade as sole, the

This was an action by the indorsee against the maker of a promissory note. The first count of the declaration was upon the note, to which were added the money counts. It appeared, that the note had been given by the defendant to a married woman, with knowledge of her coverture, to the intent the election of the lessor, or husband to the contrary; see S. P. *Henstead's case*, 5 Co. Rep. 10.

* And in support of an application to the Court for this purpose, an affidavit of the marriage, life of the defendant, and non-payment of the money, must be produced. *Metcalf and wife v. Body*, T. T. 1825. K. B. MS.

† So where a *feme covert*, without her husband's knowledge, and without disclosing that she was married, rented a tenement, the landlord, on discovering her situation, may repudiate the contract; *Rex v. the Inhabitants of Ashton-under-Lyae*, 4 M. & S. 357.

right to transfer it is in the [76] husband, not in the wife, unless, perhaps, as his agent, and even then only in his name.

that she should indorse it to the plaintiff, which was done accordingly, in payment of a debt which she owed him (in the course of carrying on trade in her own name, with the consent of her husband.) The plaintiff had dealt with her as a feme sole. It was holden, that the property in the note vested in the husband by the delivery to the wife, and that her indorsement did not transfer any interest to the plaintiff; consequently he was not entitled to recover on the special count, nor on the money counts, because no money had passed between the plaintiff and defendant. Lord Kenyon, C. J. however, observed, that as the husband permitted his wife to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, he was not prepared to say that that would not have availed, as many acts of a similar nature might be done by a power of attorney; and the jury might have presumed what was necessary in favour of an authority from her husband for such a purpose. See 2 M. 12. 69; 3 T. R. 431; affirmed Dom. Proc. 1 H. L. 569. 625; and post, Bills of Exchange.

3 *DOE, DEM. LEICESTER, AND WIFE AND OTHERS V. EIGGS.* T. T. 1808. C. C. P. 1 Taunt. 367.

But if a husband allows his wife to receive for several years the rents of property that accrued to her after separation, and never received them himself, he virtually gives her a general authority to that end.

In an action of ejectment, it appeared, that A. had devised certain premises in trust to pay the rents, &c. to his widow during his life. After the execution of the said devise, C. married the plaintiff Leicester, and separated from him before the death of the testator's widow, which was for several years; it was not shown that C. had any settlement made on her at the separation. The question in issue was, whether it was necessary that Leicester should have given a notice to quit, which he had not. A witness for the defendant stated, that he had received the rents of the said premises, for the plaintiff's wife, and handed them over to her, but had never collected them for the plaintiff; and receipts were shown, in which he acknowledged that he received the rents for the use of the plaintiff's wife. It was urged for the defendant, that this permission of the plaintiff to his wife, to receive the rents of the said premises, must be considered as an authority given by him to her for that purpose; and therefore, that such notice was requisite, as the tenant would otherwise be liable to be again called on for the rent by him. A verdict was found for the plaintiff; and on a rule nisi to enter a nonsuit being obtained, the Court perfectly concurred in the argument for the defendant. Rule absolute. See Palin. 206; S. C. Cro. Jac. 617.

4. *BROWN V. BENSON.* H. T. 1803. K. R. 3 East. 331.

The obligor of a bond given to A. B. and conditioned to pay an annuity to his wife, cannot be discharged from future payments thereof by such some covert, without her husband's assent.

The defendant and another person gave a bond to A. B. conditioned to pay to his wife an annuity of 5*l.* quarterly, for 11 years. The plaintiff being in embarrassed circumstances, left this country shortly after the date of the bond; and the obligor, having advanced on his account money to the amount of 25*l.* they, during the husband's absence, agreed with his wife that she should give up five years annuity, and consider it as paid for that period, in satisfaction of the advancement, and she signed a receipt accordingly. The jury found that the advancement was made for a debt of the plaintiff, and for his benefit. The question was, whether this agreement between the wife and the obligors was binding upon the husband, and the Court held in the negative, because the bond had no further operation than to give the wife an authority to receive the payments as they became due, which she could not transfer nor anticipate. See 3 T. R. 559; 6 id. 178; B. N. P. 174.

3. WITH REFERENCE TO HER BEING RESPONSIBLE AS A FEME SOLE.

1. *CORBET V. POELNITZ.* M. T. 1785. K. B. 1 T. R. 6. S. P. *STEDMAN V. GOOCH.* E. T. 1793. K. B. N. P. 1 Esp. 6.

Formerly a feme covert separated from her husband upon an adequate mainte-

The plaintiff having become bound with the defendant's wife, who was also made a defendant before their intermarriage, and while she was covert with a former husband, from whom she lived apart, and had an ample separate maintenance, to a third person, for a considerable sum of money; upon the promise of indemnification; and being afterwards compelled by the obligee to the payment of the money, brought his action of assumpsit against the defendant and his wife, upon that promise. After verdict for the plaintiff; it was moved in ar-

rest of judgment, it being insisted, that though it had been held that when a wife agrees to receive a separate maintenance, she shall be answerable for such maintenance; yet that was not proof of her being so far a feme sole, as to be able to make or bind herself by every species of contract.

Sed Per Cur. The only question is, whether a woman married living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, she shall be sued as a feme sole? We think she should be, and that it is just it should be so, which is quite clear from the cases of *Ringshead v. Lanesborough*, and *Burwell v. Brooks* (cited) wherein it was laid down, that where a woman has a separate estate, and acts, and receives credit, as a feme sole, she shall be liable as such. Rule discharged. See 2 T. R. 148; 1 R. & P. 357; 2 B & P. 106.

2 ELLAH V. LEIGH. T. T. 1791. K. B. 5 T. R. 679. S. P. GILCHRIST V.

BROWN. T. T. 1792 K. B. 4 T. R. 766.

To a plea of coverture, the plaintiff replied, that before the promises mentioned in the declaration, the defendant having been parted from her husband, the judge of the Consistory and Episcopal Court of London, allotted the sum of 200*l.* to be paid to the defendant, as alimony, during a certain suit then still pending in the said court, between the defendant and her husband, which was a sufficient maintenance, and regularly paid to her; that she acquired credit as a feme sole, with an averment that before the promises were made, the plaintiff had no notice of the coverture. On demurrer, the Court gave judgment for the defendant, making a distinction between a permanent separate maintenance and the present, which was only of a temporary nature.

3. MARSHALL V. RUTTON. E. T. 1800. K. B. 8 T. R. 545.

In *assumpsit* against a *feme covert*, she pleaded coverture, and that her husband was still alive. Replication, that before the making of the promises, the defendant and her husband had covenanted to live separate and apart, and that her husband allowed a competent maintenance, suitable to her degree; and that the allowance had been duly paid. After a rejoinder, the plaintiff demurred, when the question appeared to be, whether a *feme covert*, having a separate maintenance, and living apart from her husband, could be sued as a *feme sole*? *Per Cur.* We have taken the learning of all the judges, (*Perryn, B.* and *Buller, J. absente*,) who are of opinion that the action cannot be supported, inasmuch as it is founded on a contract made between parties unable to contract; for *Littleton, s. 168.* says, that husband and wife, in law, are viewed but as one person, therefore it is not necessary for us to consider the general effect and validity of the contract. In support of the action it has been said, that the wife ought to be liable to contract and be sued when her husband ceases to be her protector; she ought to be rendered competent to become her own protectress, and, as a necessary consequence, to sue and be sued. But, if we were to propound such a rule, the result might be, that if a woman eloped and lived in adultery, she would be liable for necessities; but that the law is not so; for if a woman, separated from her husband, has a separate maintenance, she must apply the same as occasions require, and if those who know of the arrangement choose to give her credit, they must take the consequence, being in no worse situation than those who have nothing to confide in but the honour of those they trust. Contracts of this description are highly beneficial in settling the relations of domestic life, and which the public is interested to preserve. In order to make them effective, the wife being incapacitated to contract, or possess herself of property, the law says, that those persons who are desirous of living separate shall have recourse to the intervention of a trustee, in whom the property in which she is intended to have the disposition may vest, uncontrolled by the right of her husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatsoever; and of these the court of equity is alone the proper tribunal to enforce and regulate the performance thereof.—Judgment for defendant.

DAVENPORT V. NELSON. T. T. 1814. K. B. N. P. 4 Camp. 26.

And coverture is an estoppel, though the defendant has sued as a *feme sole*.

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Though a *feme covert*, sole trader, by the custom of London, may bind herself by simple contract, she cannot by deed.

The defendant, who had executed deeds, and prosecuted suits as a widow, being sued in this action for goods sold and delivered, pleaded coverture. It was objected that her conduct had precluded her from pleading this plea. *1 ut Lord E. Leborough, C. J.* If it were clearly proved that her husband was still alive, the plea was an estoppel.—Plaintiff nonsuited.

Jewson v. Read. H. T. 1773. K. B. Lofft. 134; S. C. 4 T. R. 362. Cited.

The defendant was the wife of one C. J., and was a sole trader by the custom of London, and being indebted to the plaintiff, entered into a bond, in which she was described “milliner, citizen, and sole trader;” and also executed a warrant of attorney to enter up judgment on the said bond, which was entered up accordingly, and a *fiery facias* sued out, and the defendant’s goods taken in execution. On an objection to the judgment for irregularity, on the ground that the husband ought to have been impleaded jointly with the wife, though execution must be against the wife only; and that the action was not maintainable in this court, but ought to have been brought in the court of the city of London. After argument, *Per Cur.* The judgment cannot be supported, since a married woman cannot execute a valid bond at law, because that would bind her heirs, if she had real assets, which no custom would warrant. 6 CAUDELL v. SHAW. T. T. 1791. K. B. 4 T. R. 361. S. P. READ v. JEWSON. H. T. 13 Geo. 3. K. B. 4 T. R. 362. Cited.

Nor can

In an action by a widow in her own right, for goods sold and delivered by her whilst she was *covert*, it appeared that a trade had been carried on solely by the wife, within the city of London, without the interference of the husband, though he lived in the same house with her. She having obtained a verdict, a nonsuit was afterwards moved for, on the ground that the goods were *prima facie* the property of the husband, and consequently that the wife could not maintain this action in her own right, for that she could not avail herself of the privilege of being a sole trader, according to the custom of London, in the superior courts at Westminster, such privilege being confined to the city courts. In support of the verdict it was argued, that this action was not brought by a *feme covert*, the husband having died before the action was brought; and it was assimilated to the case where a *feme sole*, entitled to a *close* in action, marries, and afterwards the *baron* dies without reducing it into possession, in which case it would survive to the wife. *Set per Cur.* There the right survives to the wife by the common law of the land; but in this case the right of the wife arises only by the custom of the city of London, of which we can take no notice in this action, and therefore the action should be brought by the representatives of the husband. The superior courts at Westminster cannot take notice of this custom.

7. BEARD v. WEBB. H. T. 1800. Ex. Ch. 2 B. & P. 93. S. P. ANON. M. T. 1703. K. B. 10 Mod. 6.

Or be used at Westminster as such. And even when sued in London, her husband must be made a party to the declaration for conformity *

The defendant in error declared below in the Court of K. P. against the wife of the plaintiff in error as a *feme sole*. Plea, coverture, Replication, that by the custom of the city of London, a *feme covert* who carries on a trade without the interference of her husband, may be charged, as if *sole*, with every thing furnished her on account of her trade; and the plaintiff below averred, that the wife of the plaintiff above carried on, within the said city, and on her own account, independent of the interference of her husband, the trade of an upholsterer. The averment was supported by the evidence, and the plaintiff below obtained a verdict, and entered up judgment in the above court. On error brought, the error assigned was, that as the action was brought in the King’s Bench, the plaintiff above should have joined in defence with his wife. *Lord Eldon, C. J.* said, though the general rule, that a *feme covert* cannot be sued separately from her husband, may be interrupted by the privileges attending a custom which may have obtained in a particular place, yet the influence of that

* by the custom of London, a *feme sole* merchant is where the *feme* trades by herself in one trade, in which her husband does not intermeddle, and buys and sells in that trade; when the *feme* shall be sued, and the husband named only for conformity; and if judgment shall be given against them, execution shall be against the *feme* only; Cro. Car. 68.

custom will not extend beyond the limits of the district where it prevails. Therefore, notwithstanding it has been shown, that by a prescription long established in the city of London, a *feme covert*, trading independently of her husband, is liable, as if *sole* for the debts contracted by her on account of that trade, her liability attaches only on proceedings in the city courts. This may be collected from the analogous decisions, from *dicta* of judges, and from the arguments and coinciding judgments of eminent counsel, and from points ceded by them in a long series of cases, from the period 1 Edw. 4. to the present time. But without inquiring into the particulars of those cases, we think it will be sufficient to advert to the case of *Caudell v. Shaw*, ante, 72. which has expressly decided, that a *feme covert*, trading under circumstances precisely similar to those of the plaintiff above in the present case, cannot sue in the courts of Westminster Hall, without joining her husband. Now supplying a position, which we decidedly think correct, taken by Mr. Dunning, in the case of *Cox v. Phillips*. 3 Bur. 1776; viz. that the right to sue, and the liability to be sued, are *paribus conversis*, the same, it follows that the errors assigned are well founded. In addition to these observations, it has been said by De Grey C. J. in *Hachett v. Baddeley*, 2 El. 1081; and by the Court, in *Lean v. Shultz*, 2 Bl. 1195; that a joinder of the husband for conformity is material, even in an action brought in the city courts against a *feme covert* sole trader. Judgment reversed. See *Cro. Car.* 67; *Het.* 9; *S. C. Litt.* 31; *S. C.* 2 Keb. 583; *Comb.* 42; 3 *Keb.* 302; 3 *Burr.* 1776; 2 *Bl.* 1060; *Read v. Jewson*, cited 4 *T. R.* 362; *Cooke. B. L.* 26. ed. 4; 1 *T. R.* 5.

8. CLAYTON V. ADAMS. E. T. 1796. K. R. 6 T. R. 604.

To an action of *assumpsit* against the executor of A. B. for goods sold to her. The defendant pleaded that she was a married woman; and the plaintiff replied that she, until her death, lived and traded as a *feme covert*, and that he never knew or trusted her husband; and further, that the defendant, as her executor, possessed himself of her goods and effects, which was more than sufficient to pay him, the said plaintiff. On demurrer the Court gave judgment for defendant, because to entitle the plaintiff to maintain his action, he should have shown that the *feme covert*, when alive, might have sued, and that the property was the separate effects of the wife; whereas it did not appear that it could have been so, and the probate of the will of the wife was absolutely void. An action cannot be brought against a *feme covert*, except by the custom of London.

9. CARROL V. BLENCOW. E. T. 1801. N. P. 4. Esp. 28.

Assumpsit for goods sold and delivered. Defence, that the plaintiff was a *feme covert*. Plaintiff answered this objection by showing her husband's conviction of felony, and proving the sentence of transportation of seven years. That time, however, had now expired. Lord Alvanly, C. J. held, the production of the record of conviction, proving that the husband had abjured the realm, entitled the plaintiff to sue as a *feme sole*, and that the term of his transportation having expired did not alter the case unless defendant was prepared to prove that the husband had returned; no evidence being offered to that effect, plaintiff had a verdict.

10. LAMBERT V. MARTHA ATKINS AND ANOTHER. M. T. 1809. N. P. 2 Camp.

270. S. P. HOPEWELL V. DU PINNA. E. T. 1809. 2 Camp. 113.

In an action on a bond against a married woman, she pleaded coverture. No evidence being tendered of her husband being alive within seven years, the plaintiff was entitled to recover.

11. SPARROW. V. CARRUTHERS cited in CORBETT V. POELNITZ. M. T. 1785.

1 T. R. 6; and 2 Blac. Rep. 1197.

In an action upon a note of 10*l.*, given by a married woman, who kept a public-house, for some malt; the defence relied on was, the defendant's coverture. But upon the trial, the plaintiff proved that her husband had been transported, and the time of banishment not expired. The question was; whether she was liable? Yates, J. thought that the Court must consider the transportation as suspending her disability, and directed a verdict for plaintiff.

So one to whom probate of the will of a *feme covert* separated from her husband, and a trader on her own account, has been granted, cannot be sued in respect of property in his hands acquired by her in such trade for debts also contracted therein.

But a *feme covert* whose husband has been transported,

[81] may, after the expiration of the term, but before his return, sue upon a cause of action which accrued during that period.

Or where it appears the husband has never been heard of for seven years.

A *feme covert* is liable to be sued, though the husband be only banished for

a limited time.*

And the same rule obtains where the husband is abroad without

[82] any probability of returning;

Or even where he has gone abroad with an intention of returning, but has not done so.

But where the husband resided in the West Indies, and allowed the wife a weekly sum for the subsistence

Or where a tradesman has knowledge that an allowance is made by husband to his wife, for the payment of her necessities during his temporary absence.

12. DERRY v. DUCHESS OF MAZARINE. H. T. 8 & 9 W. 3. 1 Ld. Raym. 147.

In an action against the duchess for wages and money lent, she pleaded coverture. At the trial it appeared that the Duke of Mazarine, an alien enemy, the defendant's husband, was alive in France; the jury found for the plaintiff, because the duchess had lived here for twenty years as a *feme sole*, and had contracted debts continually as a single woman. It was moved, on behalf of the duchess, that this verdict was against evidence and law; for a *feme covert* cannot be solely charged for debts and contracts, without a divorce and alimony, although the husband be a foreigner.

Per Holt, C. J. When the husband is an alien enemy, and under any absolute disability to come and live here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts; for this case does not differ from the case of Lady Felknap and Lady Weyland, who were allowed to be able to sue and to be sued on the abjuration or banishment of their husbands, as if they had been sole. The plaintiff had judgment.

13. WALFORD v. DUCHESS DE PIENNE. E. T. 1797. N. P. 2 Esp. 554. S. P.

FRANKS v. DUCHESS DE PIENNE. M. T. K. B. N. P. 2 Esp. 587.

Assumpsit for goods sold and delivered. Plea, *coverture*. Defendant proved her marriage, and also that the Duke de Piene had gone abroad some years ago with an intention of returning, but that he had not returned, during which time, it appeared, the duchess had paid bills for articles furnished on her own account; upon this evidence, Lord Kenyon, C. J. observed, that had the duke returned and paid bills contracted by her during his absence, and again left the kingdom, she would not be liable; but under the present circumstances, the duke must be taken as having abjured the realm, and consequently the duchess must be held liable for the debts she contracted.—Verdict for plaintiff.

14. McNAMARA AND WIFE v. FISHER. T. T. 1798. N. P. 3 Esp. 18.

It appeared, in this case, the present defendant had brought an action against the present plaintiff's wife for goods sold and delivered, to which she pleaded *non assumpsit*, and gave her *coverture* in evidence. On the trial of the cause, it was proved that her husband had been in the West Indies a number of years, and had during such time paid her a weekly allowance, and that the goods were sold to her as a *feme sole*; the judge who tried the cause being of opinion that this created a liability, the jury found for the plaintiff. On a writ of error brought, the question for the consideration of the Court was, whether a married woman, who received a weekly allowance from her husband, not by deed, who resided abroad, and contracted debts as a *feme sole*, could, during the husband's life, be sued as such. Lord Kenyon said, in the present case there is no evidence to show she has a separate maintenance; and it would be too much for me to say, that because a husband supplies a wife with money from time to time, as far as he is able, that that is to be construed as putting an end to the conjugal relation between them. I cannot say so, either in point of law or conscience.—Verdict for plaintiff.

15. HOLT v. BRIEN. H. T. 1821. K. B. 3 B. & A. 252.

A husband, not separated from his wife, made an allowance to her for the support of herself and family with necessaries during his temporary absence. A tradesman, with notice of this, supplied her with goods, and brought an action against the husband to recover the value. It appeared that the allowance had been punctually paid. The judge told the jury; that as there was no proof of any separation between the defendant and his wife, nor any separate maintenance settled upon her by deed, the defendant must be considered as liable for all debts contracted by his wife for the necessary support of herself and children.—Verdict for plaintiff. Rule nisi for a new trial.

* In the case of banishment, abjuration, or exile, the law considers the husband as civilly dead, and therefore permits the wife to contract, and sue and be sued, as a *feme sole*; for it would be unreasonable that she should be remediless, and equally hard upon her creditor, who not having any mode of redress against the husband, would be without relief against the *feme*; 1 Rol. Rep. 400; Co. Lit. 132. a. 133. a; 3 Bulst. 193; 1 Bulst. 140. Mod. 85.

Per Cur. The learned judge's statement to the jury, that the husband was liable because there was no separation between him and his wife, nor any separate maintainance secured to her by deed, was incorrect. Now, if a husband make an allowance to his wife, he gives her a general credit, and she may contract debts for the necessary supply of herself and family, for which he will ultimately be liable, upoh the ground that she is supposed in contracting them to act as his servant or agent. But here the allowance made to her, and the notice of it given to the plaintiff, clearly show that, as to him, her agency in this respect was countermanded.—Rule absolute. See 5 Taunt. 353; 3 Campb. 22.

16. MARSH V. HURCHINSON. T. T. 1801. C. P. 2 R. & P. 226.

This was an action for goods sold and delivered. Defence, coverture. The defendant's husband was an *Englishman*, who, about 10 years before this action was brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period he became possessed of madder grounds, from the cultivation of which he derived considerable profit. On the invasion of Holland by the French in 1795, his employment as agent having ceased, he sent the defendant, together with his family, to reside in England, but he remained in Holland to look after his madder grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived at Aylsham, in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which this action was brought. But the Court were of opinion, that, under these circumstances, the husband's residence in Holland did not enable the wife to bind herself by her own contracts.

Or where a British subject resided in an enemy's country, not with a view of adhering to the enemy, it was holden that the wife could not be charged as a single woman;

17. FARRER V. THE COUNTESS OF GRANARD. T. T. 1804. C. P. 1 N. R. 80. S. P. ANON. M. T. 1700. K. B. 12 Mod. 603.

To plea of coverture, the plaintiff replied, that the defendant's husband "lived and resided in Ireland, and that the defendant lived in this kingdom, separate from her husband, as a *single woman*, and as such single woman promised, &c. On general demurrer,

Though she appear and act as such.

The Court held the replication bad, because the terms of it were perfectly consistent with a mere temporary absence, and applied to the case of every man who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here.

And where it appears the husband has at

18. RAY V. DUCHESSE DE PIENNE. M. T. 1811. N. P. 3 Camp. 123.

Action by payee against the maker of a promissory note. Defence, coverture. It appeared, the defendant and the Duke de P. as man and wife, came to England, and lived together as such, and that, previous to the note being given by the defendant, the Duke entered into a foreign service, and had continued abroad ever since. Lord Ellenborough, C. J. said, a married woman, under circumstances like the present, is not liable to be sued as a *feme sole*, for it cannot be contended, a woman once in the situation of a *feme covert* can become a *feme sole* because her husband has been abroad a year. The duke, being under no legal disability, may rejoin his wife in England. Where the husband is exiled, or has abjured the realm, he cannot return—there the case necessarily stands on different principles.—Plaintiff nonsuited.

[84] band has at any time lived with her within the realm, although he be abroad at the time of the action, she cannot be charged as a *feme sole*.

19. DE GAILLOU V. L'AIGLE. M. T. 1798. C. P. 1 R. & P. 357.

The plaintiff having replied to a plea of coverture, that the defendant's husband resided abroad, and that the defendant carried on business and obtained credit as a *feme sole*, &c. It was objected, on the part of the defendant, that the plaintiff could not recover, as it was not shown that the defendant enjoyed any separate provision, which was the principle that governed all the decisions on the point; but the Court being of opinion that the absence of the husband when the debt was contracted was sufficient to render the defendant responsible, observed, that the question as to the separate maintenance was put out of consideration.

But where she is otherwise liable, the fact of her receiving a separate maintenance makes no difference.

A woman who states her husband to be dead at the time she contracts, is liable if she offer no evidence to the contrary.

And proof by showing the muster roll of a ship that a person of his name was living, is of no avail.

And as the relation of marriage between a British subject and his wife is not suspended by his deserting her and going abroad, it has been holden that she cannot maintain a trespass for an injury committed to her property.

[85]

A stipulation by a husband to

20. *BARBER V. HOLMES*. T. T. 1890. N. P. 3 Esp. 190.

Assumpsit for goods sold and delivered. Defence, coverture. Plaintiff proved the delivery of the goods, and that defendant had, previous to that time, stated that her husband was dead, and had gone into mourning. No sufficient evidence being offered by defendant to prove the contrary, *Lord Kenyon, C. J.* said there must be a verdict for plaintiff.

21. *BARBER V. HOLMES*. T. T. 1890. N. P. 3 Esp. 190.

It appeared the defendant, at the time she obtained the goods for which the present action was brought, stated her husband to be dead. In her defence she offered to show, by the muster-roll of the ship *C.*, from the Admiralty, that a person of the name of *A. B.* was living at the time; but *Lord Kenyon, C. J.* said, that proved nothing, as there was no evidence whether *A. B.*, whose name was there found, was the husband of defendant or not.

22. *BIGGETT V. FRIER*. T. T. 1899. K. B. 11 East. 301.

To trespass for breaking and entering plaintiff's dwelling-house and shop, &c. and ejecting her from the possession thereof, defendant pleaded, that plaintiff, at the time of committing the trespass, and thence continually hitherto hath been, and still is, under coverture of one *A. B.*, then and still her husband, and still alive. Replication, that before the committing the trespass the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, namely, to America, without leaving any means of necessary provision and support to plaintiff, and from the time of his departure hitherto has not returned to this country, nor corresponded with, nor been heard of by, plaintiff; and that during all that time plaintiff has lived apart from her husband, and made contracts, and obtained credit, as a single woman; and for her necessary support and maintenance has, during all that time, carried on the business of a merchant as a single woman and sole trader, and as such was lawfully possessed of said dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto has been, and still is, a subject of our lord the king, and that he has not at any time hitherto abjured this realm, or been exiled or banished, or relegated therefrom. On demurrer, the Court listened reluctantly to the argument in support of the replication, and gave judgment for the defendant, observing, that the rule had been laid down in *Marshall v. Rutton*, 8 T. R. 545; it was capable of having exceptions ingrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband, not banished or the like, had never been deemed sufficient. See 1 B. & P. 357, where all the prior cases are collected; 2 id. 226; 9 East. 471; 1 N.R. 80; 4 Esp. N. P. C. 27.

(1) DEEDS OF SEPARATION BETWEEN HUSBAND AND WIFE.*

1. *RODNEY V. CHAMBERS*. E. T. 1872 K. B. 2 East. 283.

From an indenture it appeared that *E. F.*, a married woman, had a pension of 100*l.* per annum from the Irish Parliament, and an annuity of 200*l.* under

* Deeds of this description when made through the intervention of trustees are valid at law and in equity. 8 T. R. 521; 2 Bro. C. C. 90; 3 Merv. 256. hence where by articles of separation, the husband was to receive a certain annuity out of the wife's estate while he should leave her unmolested. It was holden, that on molestation the annuity ceased; 2 Anst. 345. But the Court have refused to interfere on an agreement between *baron and feme*, whereby the *feme* was to give up part of her property in consideration of their living separate, although the application was made by the *feme*; 2 Cox. 207.

A proviso in a deed of separation, that the wife surviving shall be entitled to her dower and thirds of real and personal estates, whereof the husband shall die seized or possessed, was construed not as a covenant to leave such a portion of the personal estate as she would be entitled to under the statute, but that she should be in the same situation as if not separate, as to dower and thirds; 19 Ves. 63. So where by deed of separation the husband (a trader liable to the bankrupt laws) covenanted with a trustee for the wife, in consideration of being indemnified from all debts and engagements which might be contracted by her during separation, to release his remainder in fee in certain estates of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee, to such uses, &c. as the wife shall by deed or will appoint, with power to the wife to revoke the uses in such will

the will of A. B., which latter was only payable to her so long as she lived pay to his wife's trustees an annuity as a separate maintenance in the event of a future separation, with the approbation of the trustees, has been holden a legal covenant.*

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conveyed to certain trustees in trust, as to the 100*l.* per annum, for her separate use at all events, and as to the 200*l.* per annum. in trust to pay so much of it as they should deem necessary to her separate use while she lived with her husband; but in case of any future separation, then, as the annuity of 200*l.* would be no longer payable to her under A. B.'s will, the trustees were to pay her 200*l.* if they consented to such separation, it being provided, that in case the annuity of 200*l.*, thereby assigned, should, at any time during the life of the said *feme covert*, cease to be payable, the defendant in this action (who was E. F.'s husband) should pay from thence unto the plaintiffs in this action (who were the said trustees), during the natural life of the said E. F., annuity of 200*l.*, upon trust that the plaintiffs should pay the same for the same intents and purposes, as therein before was declared touching the said annuity of 200*l.* thereby assigned. The declaration after stating the nature and purport of the foregoing indenture, proceeded to aver, that a separation did take place between defendant and his wife. with the approbation of the plaintiffs, and that the said E. F., from the time of the said separation to the commencement of this suit, continued to live separate from her husband, whereby the said annuity of 200*l.*, so given by the will of A. B., ceased, by reason whereof the said defendant became liable to pay such amount as would have become payable if the said annuity by A. B. had E. F. continued to live in lawful wedlock with her husband. The subsequent pleadings were immaterial as connected with the point in issue, which was, whether or not such a covenant was valid and effectual, it being contended that it was contrary to the policy of the law, and subversive of good morals, to enter into any contract which has a direct tendency to loosen the bond of union between husband and wife, and to facilitate their separation.

or deed; the wife executes the power by deed, which she retains in her possession, and afterwards alters and re-executes. It was holden, 1st, that the covenant, although entered into on occasion of separation between husband and wife, was yet binding in equity, being made to a third party; 2d, that it might be supported against creditors under the statute of James, by the consideration of an indemnity against the wife's debts and engagements; and, lastly, that the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the execution was void, and the original appointment therefore was decreed to be carried into execution; 3 Merv. 255.

After a deed of separation executed, the wife is not, "to all intents and purposes," a *feme sole*; she cannot be a witness against her husband, or be guilty of felony in his presence, nor can an action be maintained against her; 11 Ves. 530.

The operation of a deed of separation ceases on a reconciliation; 11 Ves. 537. But where the husband agreed to allow his wife 100*l.* the Court decreed its performance, though the husband offered to receive the wife again; 3 B. C. C. 614. There is no doubt of the general jurisdiction of a court of equity to decree the specific performance of articles between husband and wife for a separation and a separate maintenance. But the Court exercises its discretion very cautiously, and will not give its assistance until it has seen, whether, from the circumstances of the case, there is or is not a probability of the parties being reconciled; 2 Cox. 100; 10 Ves. 191.

* The validity of such covenants does not appear to have been doubted in *Chambers v. Caulfield*, 4 East. 244. abridged *ante*, vol. i. p. 292; for there the deed made provision for the event of a future separation, and the husband covenanted, "that in case of future differences, and his wife should at any time thereafter find it necessary to live separate and apart from him, he would permit and suffer her to leave him, &c. provided the separation took place with the approbation of the trustees, or of the survivor." And Lord Ellenborough, C. J. in thoroughly canvassing that instrument, instead of doubting its validity, seems to have considered it as good and binding. Upon *Rodney v. Chambers* (*supra*) being referred to in the argument, Lawrence, J. thus expressed himself; "In that case there was an averment that the separation was with the consent of the trustees. We thought that there was nothing illegal in the parties agreeing to refer the question what was a good cause of separation to a domestic forum, instead of applying to the ecclesiastical court for a divorce and alimony. The Court, therefore, only decided in that case, that a covenant for separation and separate maintenance with the consent of the trustees was good, not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant-at-will to the wife of his marital rights. Hence we have the principle upon which the above

[87] *Per Cur.* Were we now called upon to decide a question which had never before been argued, we might have been inclined to have thought that it would have accorded more with the general policy of the law to have prohibited such contracts as the one before us. The practice of giving back such agreements, has been, however, so long established, that we cannot reject the present without saying, that all contracts which have the same tendency are vitious, which would annihilate all separate provisions for the wife, be they of what nature they might, so long as they were of such a nature as would render her partially independent of the support and protection of her husband. We can only, therefore, lament the inveterate rules which have been laid down on the subject, both at law and in equity. The case of *Nicholls v. Danvers*, (2 Vern. 671) strongly supports the case which has been made by the plaintiff. There the defendant, having previously ill-treated his wife, gave her a note, that if he should again ill-use her, she should have her share of her mother's estate to her own use, and upon this happening, she and her brother filed a bill against her husband for this purpose, and the Lord Keeper decreed the interest of it to her for life for her maintenance, and afterwards to her husband for life, and the principal to the issue, if any; if none, to the survivor of the husband and wife. Now the words "in case he should again ill-use her," must have meant "in case she should have been obliged to live separately from him," because, to oblige himself to provide for her while she continued to live with him, would have been useless. That case, therefore, goes almost the whole length of the present. The case of *Gawden v. Draper*, (2 Ves. 217,) was a decision in a court of law, and establishes also the general proposition—that was a provision for a separate maintenance until such time as the parties, by a certain instrument, should declare their assent to live together again; and the question raised by the plea was, whether an actual cohabitation afterwards, by consent, without its being so signified, and a covenant to retain the provision before stipulated to be paid by the husband during such cohabitation, were a good plea in bar of the first covenant. The Court gave judgment for the plaintiff, which at least shows that the first covenant was good in law, be the merits of the plea what they might, and it cannot be supposed that the point could have passed without notice, though it does not appear in the report to have been discussed; *vide infra*. The case just mentioned is also stronger than the present, because there the feme covert herself was left to be the sole judge of the propriety of her living apart from her husband; whereas here trustees were interposed, who might be reasonably presumed to be more impartial. The case of *Rodney v. Chambers*, has been decided declared by one of the persons who sat in judgment on it, and who continued of the same opinion as he entertained when the case was determined. It may be also inferred from Lord Hardwicke's judgment, in *Moore v. Moore*, 1 Atk. 277. that he considered such an agreement *in prospectu* to be valid; and a like inference may be drawn from Lord Vane's case, 13 East. 171. in which a separation having taken place, the husband and wife agreed to cohabit, and by articles, entered into on that occasion, he covenanted that if she desired to live apart he would not molest her. After these articles were concluded, cohabitation took place; but, in consequence of ill-treatment, the husband and wife separated a second time; and she having exhibited articles of the peace against him, the Court thought, under the circumstances, and the agreement proving such future possible separation as above (the validity of which was not questioned), the wife was entitled to security. Such are the authorities to be adduced in favour of the validity of settlements containing provisions for future contingent separations. But since the unequivocal opinions of modern judges appear to be that the courts have already proceeded too far, consistently with policy and morality, in establishing deeds of separation; and as the case of *Rodney v. Chambers* (the principal one upon this subject) is considered by the profession as virtually overruled by the decision of *Abbott and Dallas*, in 1819, on a writ of error in a case of *Titley v. Durand* (differing, however, from the former case in this particular, that the future separation was not made dependent upon the consent or approbation of the trustees), it may be considered that a deed or settlement providing a separate maintenance for a wife, or an intended wife, in the event of future separation, either with or without the consent of trustees or other persons, is a provision which will not be enforced, either at law or in equity; *Roper's Law of Husband and Wife*, 276. 277; see 2 *Ridgway*, Parl. Cas. in Ireland, 268; and the observations of Lord Eldon, in the case of *Lord St. John v. Lady St. John*, 11 Ves. jun. 529; see also 11 Ves. 526.

judges. The only difference that can be pointed out between the case now before the Court, and those cited is, that the covenant is not in conformity with the will of A. B., the wife's father, which meant to give her the annuity of 200*l.* only during the period of her living with her husband. But this not in contravention of any positive law, but only of the will of an individual. What in effect does this covenant do more than to recognize the rights of the parties in certain situations, in which they are at liberty, without such a covenant, at any time to place themselves?—Judgment for plaintiffs. Vide 8 Mod. 22; 1 Burr. 542; Prec. in Chan. 496; 2 Vern. 386; 3 Bro. Ch. Cas. 614.

2. GAWDEN V. DRAPER. M. T. 1690. C. P. 2 VENTR. 217.

The plaintiff declared in covenant on an indenture, whereby the defendant covenanted that his wife, Sarah, should live separately from him, until they both gave notice, by writing, attested by two witnesses, to cohabit again, and that during that separation he should pay to the plaintiff 300*l.* per annum, by quarterly payments, for his wife's maintenance. It was then averred, that from the date of the indenture until the bringing the action, the defendant's wife lived separately from him, and that no such notice had been given; and that 75*l.* for one quarter was in arrear, &c. The defendant pleaded in bar a subsequent indenture made between him and his wife on the one part, and the plaintiff on the other, which reciting the first indenture, and that the defendant and his wife did then cohabit, and that it was then the true intent of all the parties, that so long as they did agree to cohabit, the said annuity should cease; it was therefore covenanted by the plaintiff, that, so long as the defendant and wife should cohabit, the defendant should be saved harmless from the said annuity, and might retain it; and then averred, that ever since the last mentioned indenture they did cohabit. The plaintiff replied, that they did not cohabit *modo et forme*, &c.; to which the defendant demurred, and contended that the cohabiting again, by mutual agreement, alleged in the last indenture, and confessed by the demurrer, had dispensed with the circumstance of the notice in writing, &c. required by the first indenture. But the Court gave judgment for the plaintiff; for unless the cohabitation were according to the first indenture, it was no bar, the last deed taking away the effect of the former, and that the defendant could only have his remedy on the latter deed. The effect, therefore, of the first deed was evidently to provide for future separations; for it was admitted by the demurer, that the husband and wife had cohabited together after the first deed, and it was offered to be put in force by the trustee of the wife against the husband for arrears occurring afterwards, the Court, thinking the two deeds not inconsistent, though during the actual cohabitation, at any time the defendant would have a counter remedy upon the second indenture. (See the observations of the Court of King's Bench on this case in *Rodney v. Chambers*, ante, 88.)

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3. FIELD V. SERRES. M. T. 1804. C. P. 1 N. R. 121.

Debt on bond for the recovery of arrears of an annuity given by the defendant to his wife. Plea, general issue. The defendant having obtained a rule nisi for leave to withdraw the plea of general issue, and plead, 1st, That his wife was living in adultery when this action was commenced. 2dly, That adultery was committed by his wife without his knowledge, before he granted the annuity in question. The plaintiff's counsel, in showing cause, relied on the cases of *Sidney v. Sidney*, 3 P. Wms. 269.) where it was held, that a jointure was not affected by adultery; and that of *Blount v. Winter*, and *Winter v. Blount*, (3 Cox's P. Wms. 276. n. 2. in which the Court decreed a performance of marriage articles by the husband, though the wife was living in adultery. The Court were of opinion, that these pleas if adopted would not avail the defendant on the trial, and the rule was therefore discharged.

And if a man grant an annuity to his wife on separation, he is liable to its payment, though the wife may commit adultery before he gave the annuity and though he was ignorant of it at that time

(J) ACTIONS BY HUSBAND AND WIFE.

1st. WHEN AND IN WHAT MANNER THEY MAY SUE.*

(a) *In assumptil.*

HILLIARD V. HAMBRIDGE. H. T. 1647. K. B. All. 36.

In assumption sit on a promise made to husband and wife after cover

* A feme covert we have seen cannot sue in any case alone, unless her husband be civil-

ture to pay money to the latter, they may both join.

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So a feme covert may join in an action on a note made payable to her during coverture.

but husband and wife cannot join in an action for money lent by him and his wife.

Assumpsit by husband and wife against an executor, upon a promise by his testator, after coverture, in consideration of the marriage had at his request, to pay 8*l.* per annum to the wife during the coverture. After the verdict for the plaintiff, it was moved in arrest that the action should have been brought by the husband alone, because the whole benefit was to him, the promise having been made subsequent to the marriage. Judgment was stayed; but on moving again, it was adjudged that it was in the election of the husband to bring the action in his own name, or to join his wife.

2. **PHILLISKIRK v. PLUCKWELL.** H. T. 1814. K. B. 2 M. S. 393.

This was an action by husband and wife on a note, by which the defendant had promised to pay to Mrs. S. Philliskirk, or order, 10*l.* &c., whereby as the declaration averred the defendant became liable to pay said sum to plaintiff's. At the trial it was urged, that the husband ought to have been the only party to bring the action, as it did not appear that the note in question had been given on account of any meritorious consideration or services moving from his wife. The judge did not acquiesce in such argument, and the plaintiffs had a verdict; but the defendant having liberty to move to enter a nonsuit, obtained a rule for that purpose, and now renewed the objection.

Per Cur. Does not a promissory note import a *prima facie* consideration for the promise to pay according to the tenor—that is, to the wife? and what is there to show that the wife is not the meritorious cause of action? It was incumbent on the defendant to show the contrary. The note might have been given to her for a debt due to her *dum sola*.—Rule discharged. See Co. Litt. 120. a; 1 Roll. Abr. Baron and Feme; Cro. Eliz. 61; Cro. Jac. 77. 205. 644; 2 Bl. 1236; 1 H. Bl. 114; 2 Sid. 128; 3 Lev. 403; 2 Wils. 414; Holmes v. Wood, cited, id. 424.

3. **KING v. BASINGHAM.** M. T. 1723. K. B. 8 Mod. 199; S. C. 8 Mod. 341.

An action of assumpsit was brought in the Common Pleas by husband and wife, to which they declared on several counts, and one of them was for money lent to the defendant by him (the plaintiff) and his wife, by his consent, and promises laid to have been made by them both.

On non assumpsit pleaded, the plaintiff had a verdict. It was moved in arrest of judgment, that the declaration was ill, because the wife was joined in this action with her husband, which she ought not to be; and that the joining her in the action being matter of substance, was not aided by the verdict; for by this means, if the husband should die; then what was recovered would survive to her, when it ought to go to the executor of the husband. But the judgment was affirmed, and a writ of error being brought in B. R., the same objection was made there; and that this action was founded on a contract made by the wife when by law she could not make any contract during the coverture.

The plaintiff in error's counsel excepted to the declaration; for the money being alleged to be lent by the husband and wife, must be presumed to be lent during coverture; and then the money is the husband's money only, for which he alone ought to have brought his action, for a wife can have no interest in money during coverture; Cro. Jac. 644. pl. And of that opinion was the Court; and it being laid in the damage of both, rendered the declaration untenable.—

See Cro. Jac. 479.

4 **BUCKLEY v. COLLIER.** M. T. 1691. K. B. 4 Mod. 156; S. C. 1 Salk. 114; 3 id. 63; S. C. Carth. 251.

In an action brought by the husband and wife, for work done by the wife during the coverture, the question was, whether they could join in this action. It was contended, that in trespass they may join for entering on her land, and carrying away the grass there growing, &c. So likewise where the husband *iter mortuus*, or transported for some crime: see 4 T. R. 361, 2 B. & P. 105, 4 Esp. 27, Cro. Car. 519, 11 East. 301, or there has been a divorce *a mensa et thoro*; Moor. 665, Bac. Ab. Baron and Feme, L. She may in all cases join in an action with her husband, when the cause of action would survive to her, or when she was the meritorious cause of action, and there has been an express contract with her; Cro. Eliz. 61. And she must join when the cause of action would necessarily survive to her, 1 Wils. 224, or when she sues an executrix or administratrix, 11 Mod. 177.

Nor for work done by the wife during the coverture.

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has land in the right of his wife, as a jointure by a former husband, and she is to have the lops and shrouds of the trees growing thereon, and he who has the inheritance cuts them down, they may join in an action to recover damages, because it survives to her after his death. But the Court was of opinion, that in the principal case the declaration was not good, because the action was brought for a personal thing that could not survive; and in personal actions, the law is clear they cannot join; *Cro. Eliz.* 133. *Vide ante*, p. 39.

5. *YARD v. ELLAND*. M. T. 1697 K. B. 1 *Ld. Raym.* 368; S. C. 12 *Mod.* 207; S. C. 1 *Salk.* 117; S. C. *Carth.* 462.

This was an action of assumpsit, wherein the plaintiff declared, that whereas the defendant, on the 6th of June, 9 W. 3. was indebted to the plaintiff, and Susannah his wife, as executrix of the testament of S. T., 6*l.*, for arrears of rent due to S. T. in his life-time; and so being indebted, in consideration the said plaintiff would give him time to pay the same till Michaelmas then next following, he promised to pay the said 6*l.* to the said plaintiff at the feast of Michaelmas then next following; and shows that he gave him time till the next Michaelmas, but that the said defendant has not paid, and avers the life of his wife; and on non assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that this action should have been brought by the baron and feme, because the debt, which was the foundation of the promise, was due to the wife as executrix; and the money, when recovered, would ensue the nature of the debt, and be assets. But the whole Court held the action was well brought by the husband only; as in the case of *Ilea v. Thinne*, *Yelv.* 84; and it would have been ill if it had been brought by the wife, because the wife was not privy to the contract; but if it is a special promise, made to the husband only, to whom the payment is only to be made, and the recovery on this promise must be only by him, in his own right, which promise does not alter the debt, because it is not of a higher nature, but is a sort of collateral security; and the money recovered on this promise is no part of the personal estate of the testator; for if the husband dies, his executor shall have execution thereof; but yet, when it is recovered, it is a devastavit in the husband, so far as he recovers.

So on a promise to a husband to pay him money due to his wife as executrix, in consideration of his forbearing to sue for it. the husband may sue alone.*

(b) *In debt.*

1. *HUGGINS v. DURHAM*. M. T. 1726. K. B. 2 *Str.* 726.

In error on a judgment in C. B. in an action of debt brought by husband and wife, against the Warden of the Fleet, for 46*l.* 6*s.* 2*d.* on the escape of O. R. who was committed by the Court of Chancery for that sum. The declaration set forth, that on the 5th of February, 6 Geo. there was a decree, reciting the bill against R. et al' by the wife only, which suit abated by her marriage with the other plaintiff, who revived the suit, and R. put in his answer, insisting that he had repaid 200*l.* part of the money; and an issue being directed thereon, the same was tried on a feigned issue, and found against him; that then the cause was heard on the equity reserved, when it was referred to the master to take the account, who reported 46*l.* 6*s.* 2*d.* to be due, and appointed it to be paid to the husband. Then the plaintiffs set forth, that the report was confirmed and R. prosecuted so far, as to be committed for non-payment, when the defendant suffered him to escape. After a judgment by default, in C. B. it was objected, on error by the plaintiff's counsel, that the wife ought not to have joined in this action; for by stat. 5 Ann. c. 9. s. 4. the action is given to such person to whom the money is paid by the decree; and this not being an action maintainable at common law, they must take it as the statute has given it; and if the wife is joined where she ought not, it is error; 1 *Roll. Abr.* 782. And this is in the nature of a distinction of the first cause of action, and giving the husband a new one in his own right. But,

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Where an action by husband and wife had been referred, and the master ordered the sum due to be paid to the husband only, and the defendant escaped, it was held that husband and wife might join in an action of debt for the escape.

Per Cur. Though the order only appoints it to be paid to the husband, yet by the first decree it is directed, that the master should take an account of what is due to the husband and wife, which shows she was interested in the cause, and therefore proper to join in the action. Judgment affirmed.

* And he may sue without his wife to recover back money paid by her in the purchase of property without his consent. 2 *Lord Raym.* 225; S. C. *Comb.* 450.

But not in debt on bond made to the wife before coverture; see *vide* note.

And on a [93] bond given to them both during coverture, he may sue alone.*

And after her death he must sue as her administrator.

The husband may sue alone as on a bond made to himself, on such security being given to him, and his wife as administratrix.

Baron and feme may join in covenant for rent of the wife's lands, due upon a lease granted by them.†

[94] Or he may sue alone.

2. *HOWELL v. MAINE*. M. T. 1693. K. B. 3 Lev. 403. S. P. 3 Salk. 64. Debt was brought by the husband alone, upon an obligation to the wife before the coverture. The defendant demands oyer of the condition, which was to pay money to the feme, and then demurred to the declaration; and after several arguments, judgment was given to the plaintiff. See Co. Litt. 351. 396.

3. *BEAVER v. LANE*. E. T. 1676. C. P. 2 Mod. 217.; S. C. Jones. 367. North, C. J. said, that he remembered an authority in an old book, that if a bond be given to husband and wife, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her. See Doug. 329; Moor. 912; 12 Mod. 207; 2 P. Wms. 497; 1 Show. 366.

4. *DAY v. PADRONE*. T. T. 1746. K. B. 2 M. & S. 396. note. Plaintiff, as administrator to his wife, brought debt upon a bond given to her during the coverture; and on demurrer to the declaration, it was objected that the action should have been brought by the husband in his own right, and not as administrator, because the wife never had any sole right of action in her. But the Court gave judgment for the plaintiff, observing, that though the bond might have been sued by the husband alone in the wife's life-time, yet after her death he must sue as administrator.

5. *ANKERSTEIN v. CLARKE*. E. T. 1792. K. B. 4 T. R. 616. In an action on a bond by the husband only, it appeared that the bond had been given to the plaintiff and his wife as *administratrix*. On an objection being taken on the ground of variance, the plaintiff was nonsuited; but on motion the nonsuit was set aside, the Court being of opinion, that the husband might either join with his wife or sue alone; and the circumstance of her being an *administratrix* made no difference, for the *baron* may reduce all the assets into possession, and will only be liable on a *devastavit*, if he did not pay the debts, &c. of the intestate.

(c) In covenant.

1. *ALEBERRY v. WALBY*. M. T. 1719. K. B. 1 Stra. 229. In error on a judgment in C. B. in an action of covenant brought on a lease for years, where the breach assigned was non-payment of rent; judgment was assigned by default, and a writ of inquiry executed; general errors, and want of an original, assigned, and returned accordingly: another original alleged by the defendant of another term, and a *certiorari* prayed, and one returned and set forth, and some little variances; and no error pleaded.

The counsel for the defendant in error urged, that this was an action by a man and his wife, and a third person, who is tenant in common with the wife, on a lease at will, made during the coverture, of lands which are the inheritance of the wife and that third person, for arrears of rent incurred during coverture, and therefore the wife cannot join in such an action. 1 Sid. 224. *Sed per Cur.* The husband and wife may or may not join in this action at their election, as where a bond is to both of them. See 4 H. 5. 6; Cro. Jac. 77; Cro. Eliz. 61.

2. *BEAVER v. LANE*. E. T. 1676. C. P. 2 Mod. 217; S. C. Jones. 367. Covenant made to husband and wife; the husband alone brought the action, *quod teneat ei conventionem secundum formam et effectum cujusdam indenturæ inter querentem ex una parte et defendantem ex altera parte confect'* and this was for

* Or the husband and wife may join; Bro. Baron and Feme, pl. 14. 55; see 2 P. Wms 497; in which case if the husband dies, the wife shall have the bond; Bro. Baron and Feme, pl. 60. So where husband and wife have recovered judgment on a bond made to wife *dum sola*, husband and wife may join in an action on such judgment, or the husband may sue alone; *Wolverston v. Fynnamore*, cited, 1 Selw. 291. But in an action on a bond given to her *dum sola*, they ought to join; 2 Atk. 280; 3 T. R. 634; 1 M. & S. 180; 1 Rol. Ab. 437. R. pl. 3; 3 Mod. 186; *vide* *Howell v. Maine*, *supra*, *contra*.

† So they may join in covenant where a lease is granted to them for a term of years, and the lessor evicts them; Bro. Abr. Baron and Feme, pl. 25. So they may maintain covenant against a lessee for years for not repairing during the coverture, or the husband may sue alone; Cro. Jac. 399; S. C. Bulst. 163; see Cro. Car. 505; and in general in all actions for a profit, &c. accruing during coverture from the *real estate* of the wife, they may join, or the husband may sue alone.

not repairing his house; after verdict for the plaintiff, it was moved in arrest of judgment, because of this variance. But the Court ordered that the plaintiff should have his judgment; for the indenture being by husband and wife, it was therefore true that it was by the husband; and the action being brought upon a covenant concerning his houses, and going with them, though it be made to him and his wife, yet he may refuse *quoad* her, and bring the action alone.

(d) *In detinue.*

Husband and wife must join in detinue of charters of the wife's inheritance; 1 Rol. Ab. 347; R. Pl. 1; but for the recovery of personal chattels he must sue alone; Bul. N. P. 50; see *post*, 100.

(e) *In case.*

1. WELLER AND WIFE AND OTHERS v. BAKER T.T. 1769. C.P. 2 Wils. 414.

The dippers at Tunbridge Wells all joined; and, with their husbands, declared in an action against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute. The defendant pleaded the general issue. And on the trial a verdict was found for the plaintiffs, and five shillings damages, subject to the opinion of the Court upon the following case, which stated, that the plaintiffs gave in evidence a private act of parliament, passed in the 13th year of Geo. 2. confirming certain articles of agreement inserted in the said act, in which are contained the two following clauses, viz.

"Fifthly; It is also further agreed between the said parties, that the said Maurice Conyers, and his heirs and assigns, and the several freehold tenants parties thereto, and their respective heirs and assigns, shall and will from time to time, and at all times for ever hereafter, permit and suffer the said medicinal springs or wells of water called Tunbridge-Wells, the place or shed near the said springs called Dippers-Hall, and the Walks called Tunbridge-Wells Walks, and all ways, passages, and open pieces of ground, part of the said premises, or leading thereto, which are particularly set forth and distinguished in the plan of the premises hereunto annexed, to remain always open and free for the public use and benefit of the nobility and gentry, and other persons resorting to, or frequenting Tunbridge-Wells, in the manner the same now are, or lately have been used, and that the said Maurice Conyers, his heirs and assigns, shall and will, from time to time, join and concur in doing all such acts and things as shall be necessary for the preparing and keeping the same open and free, according to the true intent and meaning of this agreement.

Thirteenthly; Also it is hereby further agreed by and between the parties hereto, that no person shall be permitted to attend and follow the employment of a dipper of the said medicinal waters, but such as shall be chosen by the homage. at the court baron to be held for the said manor, and approved by the manor; in which choice and approbation the wives, widows, and daughters of freehold tenants of the said manor shall be preferred, and shall not exceed the number of twelve." It did not appear in evidence, that the homage and lord had ever acted under the said act of parliament, or that there had ever been any dippers chosen by the homage, and approved by the lord, from the time the said act passed until the 26th of May 1768, when, at a court baron then holden, the homage chose, and the lord approved, &c. *prout* the following entry upon the rolls of the said court, viz.

"At a court baron of Sir George Kelly, knt. lord of the manor of Rusthall, held at Seldhurst, in and for the said manor, on the 26th day of May, in the year of our Lord 1768, before Thomas Scoones, gent. steward of the court of the said manor.

"Also the homage aforesaid do choose Elizabeth Weller the wife of John Weller, Ann Crips widow, Sarah Fry the wife of Benjamin Fry, Susannah

The dippers at Tunbridge Wells and their husbands brought case against the defendant for exercising the trade without being duly appointed, it was holden that the action was well brought in the names of the husbands and wives* [95]

* So in an action upon the case for stopping up a way to wife's land; Cro. Car. 418; or for cutting down trees, the tops of which were reserved to the wife for her life; Cro. Car. 437; husband and wife may join. So in an action for waste committed on her land; 7 H. 4. c. 15. a; 3 H. 6. c. 34.

Mercer the wife of John Mercer, Elizabeth Fry the wife of Thomas Fry, Ann Okill the wife of William Okill, Mary the wife of William Friend, and Dorcas Baker spinster, to attend and follow the employment of dippers of the medicinal waters within this manor, commonly called Tunbridge-Wells, subject nevertheless to the approbation of the lord of the said manor.

"The lord's approbation: At this court, Sir George Kelly, *knt.* lord of this manor, approves of all the persons so chosen by the homage for dippers as aforesaid; Dorcas Baker only excepted."

It did not appear in evidence, that any notice was given previous to the holding of the said court, of an intention to appoint dippers there.

It appeared in evidence, that Dorcas Baker, the defendant, was a daughter of a freehold tenant of the manor, and also a freehold tenant in her own right, but no evidence was given by the plaintiffs that they, or either of them, were, or was respectively, the wife, widow, or daughter of a freehold tenant. It appeared, that the defendant, Dorcas Baker, had acted as a dipper during the last summer, but there was no proof of her having received any gratuity, other than general evidence, that the employment of a dipper is attended with profits which arise from the voluntary contributions of the company resorting to Tunbridge Well. This case was twice argued.

[96] *Per Cur.* There are two general questions in this case; 1st. Whether the defendant, Dorcas Baker, the daughter of a freehold tenant of the manor, and chosen by the homage to be a dipper at the Wells, but not approved of by the lord of the manor, can justly follow or exercise the employment of a dipper? 2ndly, Supposing she cannot, whether the plaintiffs have a right to recover in this action? As to the first question, we are all of opinion that the defendant cannot justly follow or exercise the employment of a dipper; the words of the agreement between the lord and his freehold tenants are, "that no person shall be permitted to attend and follow the employment of a dipper of the medicinal waters, but such as shall be chosen by the homage, at the court baron to be held for the manor, and approved by the lord," &c. which are now the words of an act of parliament, and as clear and plain as words can possibly be; none shall be dippers but such persons as shall be chosen by the homage, and also approved of by the lord. Dorcas Baker (it appears) was not approved of, but, on the contrary, was excepted against by the lord; therefore, by the clear words of the statute, she shall not be permitted to attend and follow the employment of a dipper. The intention of the statute is also plain; before the making thereof, there was a great contest between the lord and his tenants touching their right of common, these wells, and other matters; the lord was much benefitted by the great resort of the nobility and gentry to drink the waters, and the tenants thought themselves injured in their right of common, &c. at length the articles of agreement were made and executed, and being found to be for the mutual advantage of the lord and tenants, were confirmed by parliament, and made firm and permanent; the benefit of these waters being thereby given freely to the public, it was necessary to establish a rule, how, and in what manner, they should be dealt to the public. The tenants having lost part of their common, thought they ought, in consideration thereof, to have some benefit; therefore to prevent strife, confusion and a kind of civil war amongst the tenants, which must necessarily follow if every body who pleased was suffered to exercise the employment of a dipper, it was agreed, that the the homage should choose, and the lord should approve, not more than twelve persons to be dippers; so that, by this law, all dissolute idle persons are prevented, and no person shall come to be a dipper at the wells, but whom the lord pleases, who is the owner of the soil where they are; *cujus est dare ejus est disponere*; it was a very right measure, that every person should be (as it were) stamped with the seal of both the lord and the homage, before she should be permitted to exercise this employment of dipper; so that we have no doubt but the lord must approve. Another matter was mentioned at the bar as to this first question, and that was, whether these words in the articles and statute, viz. "In which choice and approbation the wives, widows, and daugh-

ters of freehold tenants of the manor shall be preferred," are mandatory or directory: but this not being an action against the lord for refusing to approve of Dorcas Baker, after she was chosen by the homage, we need not determine this matter. There are many cases where the words of the statute seem to be mandatory, yet have been held to be only directory; and so *e contra*, where words which seem to be directory have been held to be mandatory; the subject matter of the statute must explain the true meaning thereof. The words, in the present case, seem to be mandatory; and yet, on the other hand, if they be absolutely compulsory, it would take away the choice and approbation of the wives, widows, and daughters of freehold tenants; we give no opinion as to this matter, but think, that if the homage do choose the wife, widow, or daughter of a freehold tenant to be a dipper, the lord ought to approve of such person, unless he has some good exceptions against her. If Dorcas Baker could have an action against the lord for not approving of her after the homage had chosen her, she could only recover damages, and not a specific relief; but let her right of action against the lord be what it will, it does not apply to our case. At present, we are of opinion, she cannot justly follow or exercise the employment of a dipper; which brings us to the

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Second question. which is, Whether the plaintiffs have a right to recover in this action?

Several objections were made by the counsel for the defendant; 1st, it was said, that there must be both an injury and a damage done to and sustained by the plaintiffs, to support an action upon the case; in answer to this, we say, here is both an injury and a damage; an injury, by the defendant's disturbing the dippers in the exercise of their right or employment, and a real damage in depriving them of some gratuity which they would otherwise have received, perhaps more than they might truly deserve for their labour and pains; besides an action upon the case will lie for the possibility of a damage and injury. As for persuading A. not to come and sell his wares at the market of B. the lord of the market may have this action.

2dly. It was said, that this is not such an office or employment for which an assise would lie, and therefore this action will not lie. In answer, we think this may be employment for life, determinable upon misbehavior; and if so, it is a freehold, has a certain place where it is exercised, and may be put in view to the recognitors; however, we think it such an interest or employment that an action upon the case will lie against a stranger for a disturbance therein.

3dly, It was said, that no notice was given previous to the holding of the court baron on the 26th of May, of any intention to appoint dippers thereof which ought to have been done; in answer to this, it is stated in the declaration, that the dippers were chosen and approved at that court baron; and Mr. Justice Clive has reported, that it was proved at the trial, that the usual notice of holding the court baron was given; it is the court of the freeholders who are the judges thereof; the steward is only their prothonotary, and notice is never given of any particular business to be done at a court baron; if any body is to give notice, it must be done by the freeholders, for it is their court, and they are the suitors thereof. What? must the freeholders give notice to the freeholders? it is nonsense to say so; and, perhaps, the greatest part of them may be dispersed all over England, or many of them may be abroad in other countries. But here is the act of parliament which gave them all notice; so we are of opinion, that notice of this particular business to be done was not necessary to be given by, or to any body.

4thly, It was said, the plaintiffs cannot join in this action. But we think they must join, for although the dippers are severally entitled to receive for their own several use such voluntary gratuities as the nobility and gentry are pleased to give them respectively, yet with regard to a stranger's disturbing them in their employment, they are all jointly concerned in point of interest; it is a tort as done to them all, like the case of the two mills in 2 Saund. 215. 216. 217; whereof the two plaintiffs were severally owners, and joined in action against the defendant for not grinding at one or either of their mills, which he was obliged

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to do by the custom of the manor; the principal objection there was, that the plaintiffs had joined in one action, where it appeared their interests were several. Hale, C. J. and the whole Court, were of opinion, that they might well join in action; for although their interests are several, yet the not grinding at either of their mills is one entire joint damage to both the plaintiffs, for which they shall have their joint action, or otherwise the damages would be twice recovered, if they should bring their several actions 1 Vent. 167. 168, S. C. 2 Lev. 27; S. C. this case is directly in point as to this objection.

5thly, It was objected, that the plaintiffs ought to have alleged in their declaration that the dippers were ready to dip at the wells: but they have alleged, that they took upon themselves the said employment of dippers at the wells; and that the defendant, well knowing thereof, disturbed them, &c. that is well enough.

Lastly, It is objected, that the husbands and wives ought not to have joined in this action; in answer to this, it is very difficult to reconcile all the cases in the books touching this matter of joinder in action; at present, it is sufficient for us to say, that this action is not grounded on any contract express or implied, but the husbands are joined to assert the right and interest of their wives, which have been disturbed and injured by the defendant. Whatever be the nature of this right, interest, or employment, it is her own, the husband has nothing at all to do with it, he only joins for conformity. It is a stronger case than an action by baron and feme touching the wife's lands where they must join; 1 Pulst. 21; or than the case of a debt due to the *feme dum sola*, wherein they must join; Moor 422. Baron possessed of tithes in right of the feme, they must join in the action of debt, upon the stat. 2 Ed. 6. for not setting forth tithes, because the feme is proprietor; Cro. El. 608. 613. So in the case at bar, the feme is the proprietor; and if she must join in a case where the husband has an interest in her lands *a fortiori*, she must join in the present case. They may join in trespass *de clauso fracto* and cutting their grass; Cro. Eliz. 96. And this same point was ruled in the case of Willy and his wife v. Hawkemore, B. R. that they may join in trespass *quare clausum fregit* of the wife's land. Wherever the wife is the meritorious cause, she may join in action. A very strong case to this purpose is 2 Sid. 128. and so is Cro. Jac. 77. which was case by baron and feme upon an *assumpsit* for curing a wound by the wife, and alleged in *facto* that she cured it, resolved that she was the cause of the action; and so the action brought in both their names was well enough. The case of Holmes and wife v. Wood (argued in Mich. term, 3 Geo. 2. but not determined till Easter term following) was an action upon the case, wherein the plaintiffs declared, upon a *quantum meruit*, for a cure done by the plaintiff's wife; and upon another count for medicines and plasters found and provided for the defendant. Upon a general demurrer, it was objected, that the wife could not join, for that she was not the sole cause of the action, because the medicines and plasters were the husband's own property, and the damages could not be severed; and of that opinion was the Court; but they said, that if the action had been brought for the labour of the wife only, she might well have joined.

2. HARWOOD v. PARROT. M. T. 1701. K. B. 7 Mod. 104. S. P. SMITH v. DIXON. T. T. 1773. K. B. 2 Stra. 977.

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But it seems that the husband ought to sue alone for maliciously indicting his wife.*

In an action on the case brought by husband and wife, for maliciously indicting the wife for a riot; the first count stated that the plaintiff's wife was of good reputation, and that the defendant, to lessen it, indicted her for a riot, of which she was duly acquitted. The second count was similar to the first, but stated that the husband was put to great expence: as to the first, it was held to be no scandal to be guilty of a trespass; and as to the other, the court inclined, that the husband alone ought to have brought the action, for he alone could be put to the charges; but they delivered no positive opinion. In Smith

* The distinction is between actions brought for the personal suffering of the wife and actions for pecuniary losses accruing to him individually; in the former he should be joined, and not in the latter.

v. Dixon, *supra*, the Court held an action under similar circumstances, by the husband alone, to have been well brought.

3. FROSDICK v. STERLING. M. T. 1676. C. P. 2 Mod. 270.

The plaintiff *alone* brought an action on the case, and declared that he was seized in right of his wife, of a messuage, bakehouse, &c., and that the defendant erected two nuisances so near the bakehouse, as to render the walls thereof foundrous, and by which the air became so unwholesome, that he lost his custom, &c. After verdict for the plaintiff, it was moved in arrest of judgment, that the wife ought to have been joined in the action; for where she may maintain an action for a *tort*, done in the life-time of her husband, if she survive, and where she may also recover damages, in such cases she must join. *Sed per Cur.* Where the action would survive to the wife, they ought both to join; but which if they had done here, it would have been hard to have maintained the action; because entire damages are given, and for losing the custom to his bakehouse, the husband alone ought to bring the action.

And a husband seized of premises in right of his wife, may sue without her for disturbing him in the enjoyment of them.

4. ANON. M. T. 1676. K. B. 1 Sid. 346.

In an action for words not actionable in themselves, but only in respect of collateral damages, being spoken of the wife, it was holden that the husband must bring the action *alone*, and, if the wife be joined with him, the judgment ought to be arrested.

And in an action for slandering his wife, whereby he sustained special damage;

5. COLEMAN v. HARCOURT. M. T. 1663. K. B. 1 Lev. 140.

A man and his wife, who kept a victualling-house, joined in an action against the defendant for saying to her, *Thou art a-bawd to thy own daughter*, per quod J. S., who used to come to the house, forbore, &c. *ad damnum ipsorum*. After verdict for the plaintiff, the judgment was arrested, because the words were not actionable, but in respect of the special loss which is to the husband only.

As for saying his wife kept a bawdy-house.

6. BALDWIN v. FLOWER. H. T. 1636. K. B. 3 Mod. 120.

Husband and wife brought an action for words spoken of the wife. The declaration stated that the defendant having some discourse with another person called the wife *whore*, and said that *she was his whore*, and concluded *ad damnum ipsorum*, &c. After verdict for the plaintiff, it was moved in arrest of judgment that these words were not actionable without special damage.

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Sed per Cur. These words are actionable; and three of the judges were of opinion, that the conclusion of the declaration was as it ought to be. But *Whythens, J.*, denied it; for if an innkeeper's wife be called a *cheat*, and the house lose the trade, the husband has an injury by the words spoken of his wife, but the declaration must not conclude *ad damnum ipsorum*.

But husband and wife may join in a suit for words actionable in themselves, and the declaration may conclude *ad damnum ipsorum*.*

(f) *In trover.*

BLACKBORNE v. GREAVES. T. T. 1673. 2 Lev. 107; S. C. 3 Keb. 62. 263. 329; S. C. Vent. 260.

Trover for 200 load of wood. The declaration stated that the wives of the plaintiffs *dnm sola* lost the wood; and that after Blackborne and his wife married, the defendants converted the property. Upon not guilty pleaded, and a special verdict found, it was objected that the trover being laid before the marriage, and the conversion after, that baron and feme could not join, but baron ought to sue without the wife, for the conversion was the cause of action. But the Court held it well with or without the wife; for the inception of the cause of action was in the wife by the trover, though not *choate* till the subsequent conversion.

In trover for a personal chattel of wife before, and conversion after, marriage, baron and feme may join.†

* But saying of an innkeeper's wife that she was a whore, &c. and had a bastard by T. per quod he lost his custom, *ad damnum ipsorum* was not good, for they could not join in the *per quod*, and yet the words being actionable in themselves, they might join in the action. Judgment arrested; 3 Keb. 387; *sed vide*, as to the words being actionable, post, tit. Slander.

† But if in trover by baron and feme; they declare *quod cum possessionat fuerunt*, &c., and that the defendant converted *ad damnum ipsorum*; this is bad even after verdict; for the possession of the wife is the possession of her husband, and so is the property; hence, the conversion cannot be to the damage of the wife, but of the husband only; 1 Salk. 114.

(g) *In replevin.*

1. OSBORNE v. WALLEEDEN. M. T. 1669. K. B. 1 Mod. 272; S. C. 2 Saund. 197; S. C. 2 Keb. 712; S. C. 1 Danv. Abr. 651.

A husband may avow alone for rent due in right of his wife;*

Replevin. The defendant avowed in right of his wife, for a rent charge devised to her for life by her former husband. It was objected that the avowry was ill, for it ought to have been in the wife's name as well as the husband's† and in support of this it was stated, that Rolle, in his abridgment, had made a *quære*, and seemed to be of opinion, that in the case of *Wise v. Eellent*, Cro. Jac. 442; 1 Roll. Abr. 318, which is to the contrary, was not law. But *Twisden, J.*, said that may have been his opinion when he was a student. You have in that work of his a common-place book, which you stand upon too much. I value him where he reports judgments, &c., but otherwise it is nothing but a collection of year books, and little things noted when he made his common-place book. His private opinion must not warrant or control us. It has been adjudged that the husband alone may avow in right of his wife; this objection cannot be sustained.

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2. BERN v. MATTAIRE. E. T. 1735. K. B. Ca. Temp. Hard. 119; S. C. 2 Stra. 1015.

Or where it does not appear that the taking was during the coverture; husband and wife† may declare in replevin, for taking their goods, for they might have been jointly possessed before marriage.

Action of *replevin*, wherein the plaintiff declares for taking fourteen skimmers and ladles, and three pots and covers, the goods and chattels of him the said — Bern and — his wife; the defendant avows the taking for arrear of rent on a demise; the plaintiff pleads in bar to the avowry, and traverses the demise; and issue is joined on that traverse of *non demisit*, and a verdict for the plaintiffs, that no such demise had been made; and thereon it is moved in arrest of judgment on behalf of the avowant, and two exceptions taken to the declaration; it was objected first, that a declaration in *replevin* cannot be maintained by a husband and wife jointly for taking the goods of the husband and wife; and second, that it is a bad declaration for laying it to be to the damage of both. *Per Cur.* As to the first exception, it depends on this foundation, that husband and wife cannot have a joint property in chattels, and in general that is true, because marriage is a gift of all chattels to the husband: but in this case it does not appear that the taking was during the coverture, nor can we presume it was, and the plaintiffs, for aught that appears, might be jointly possessed of these goods before marriage, and if that were the case, that they were so jointly possessed before marriage, and those goods taken before marriage, they may, after coverture, join in the replevin, and declare for taking the goods of husband and wife, and if there can be such a case, we must take it to be so here, because the avowry allows a property in them both, if it may be, by not disputing the property as the avowant might have done. — So in the year book of Michaelmas, Ed. 2. fo. 44. 175. this exception was over-ruled. So in Bro. Ab. tit. Baron and Feme, pl. 85. he says baron and feme shall not join in *replevin*; but *quære*, as to goods which she has as executrix, for there it seems she shall join in replevin for the goods of the wife taken when she was sole. So in *Blackborne v. Greaves*, ante, p. 100. in trover brought by the husband and wife, though the conversion was laid after the marriage, it was held that in regard the trover was laid to be before the marriage, which was the inception of the cause of action, the wife might be joined; as if a man has the custody of a woman's goods, and afterwards marries her, she may join in *detinue* with her husband; and Hale said in such case the husband may bring the action alone, or jointly with his wife; and so we take the law to be in this case, that the husband might have declared in this replevin alone, or jointly as he has done. The material authorities that have been cited against this doctrine are F. N. B. fo. 69. Let. K. but is only that the goods

* So if the goods of a feme sole be taken, and she marries, her husband alone may bring the replevin; for the property being personal, is transferred by the marriage, and vested absolutely in the husband; Glib. Replev. 156; or the husband and wife may join post 101. and tit. Replevin.

† In the replevin of goods which the wife has, as executrix, husband and wife shall join; F. N. B. 159.

But if cognizance is made in replevin as bailiff of B. and wife, and it is proved that the receipts and the authority to distrain were by B. solely, it is a fatal variance.

The wife cannot be joined in an action of trespass *de bonis asportatis* But baron and fewe must join in an action of trespass for an injury done to the goods of the feme
[103]
dum sola,* but if she sues alone, the defendant cannot take advantage of it by pleading the coverture in bar.

it must be
pleaded in
abatement.
And if in
trespasse for
an assault,
it can be
shown that
the *feme*
consented
to the as-

...sault, the
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...d be brought
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...is band
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with this action, because it was *with her own consent*; and in such case, therefore, the husband may, and ought, to bring the action alone upon his special case; for though the wife consent, that will not excuse the defendant, for she hath *protestatorem corporis sui*; and *Holt* said, that at the very last assizes the *Chief Baron* overruled him in that very exception; and so it was said *Lord Hale* had done. But *Vaughan, C. J.* did allow it, and always held that they could not join. See ante, tit. Adultery.

4. *NEWTON v. HATTER*. M. T. 1704. K. B. 2 Id. Raym. 1208. S. P. HOCKETT v. STEDDOLPH. H. T. 1674. C. P. 2 Mod. 66; 1 Vent. 93.

The plaintiffs brought an action of assault and battery, for a battery committed on them both. Judgment was obtained by default, and a writ of inquiry was executed the 17th of May, 1705, and entire damages, viz. 17l. 10s. were given; and on the return of the writ of enquiry, judgment was arrested, because the wife cannot be joined in an action with the husband for a battery on the husband. After which, they brought a new action only for the battery committed on the wife, and laid it to the damage of the said John, the husband. On not guilty being pleaded, a verdict was given for the plaintiff; and the defendant's counsel moved in arrest of judgment, because it ought to have been to the damage of them both, the damages in such case surviving to the wife if the husband dies before they are received; and cited 1 Sid. 387; *Hoffin v. Byles*. And of that opinion was the Court. See Cro. Jac. 501.

5. *PAKER v. BOLTON*. M. T. 1808. 1 Campb. 493.

Declaration against the defendants as proprietors of a stage-coach, after stating, that in consequence of the negligent driving, the coach was overturned, and the plaintiff thereby was much injured, and his wife severely hurt, alleged that in consequence thereof she died, and that the plaintiff had been deprived of her assistance and comfort, and undergone great grief and anguish of mind. It was proved, that the plaintiff and his wife were publicans, and that she conducted the business, and that he was very fond of her. *Lord Ellenborough, C. J.*, in his direction to the jury, said, in assessing the damages they must only take into consideration the bruises which the plaintiff had himself sustained, and the loss of her society up to the period of her death, and that they could not take into consideration the loss or grief occasioned by her death. See 11 Mod. 264.

6. *HUXLEY v. BERG*. M. T. 1815. K. B. N. P. 1 Stark. 98.

In trespass for an assault and battery. To show the violent nature of the assault, it was proved that the plaintiff's wife was so alarmed that she immediately afterwards became ill and died. *Lord Ellenborough, C. J.* held this not admissible in aggravation of damages, but evidence to show how outrageous and violent the assault had been.

(i) *In ejectment.*

If *baron* and *feme* are disseised of the land of the *feme*, they must in general join in an action for the recovery of it; *Bulst.* 121. But it is said that he may, in such case, bring an ejectment alone; 2 Mod. 270.

(j) *By quare impedit.*

Where the right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly; Bro. Earon and Feme, pl. 41.

2d. HUSBAND'S POWER OVER THE PROCEEDINGS WHEN SHE SUES ALONE.*

1. *CHAMBERS v. DONALDSON AND OTHERS*. E. T. 1808. K. B. 9 East. 471.

A *feme covert* living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the Ecclesiastical Court, brought trespass in the name of her husband against wrongdoers, for breaking and entering her house, and taking her goods. A rule *nisi* had been obtained to stay proceedings, and make the plaintiff's attorney pay the costs, upon an affidavit by the

* If a wife be beaten or slandered, she cannot, by law, compel the husband to bring an action; *Manby v. Scott*, Bridg. Rep. 232. The husband must appoint an attorney for himself and his wife, she not being competent to give such an authority; 2 Saund. 213; *Yelv.* 1; *sed vid.* Cro. Car. 165.

husband himself, that the suit had been instituted in his name without his consent. *Per Cur.* We must discharge the rule. This is an application by the defendants, colluding with the husband, to protect their own wrong by defeating the action in the only form in which, under the unfortunate circumstances of the case, the wife can protect herself. The husband was not without a remedy, for he might have released the action without lending his aid to the present application; or if he had applied to this court to be indemnified against any claim upon him for costs, in case the action did not succeed, we should have acceded to his request; and if the attorney who sued out the writ had behaved ill in so doing, the husband might have applied against him for such misconduct. We cannot therefore interfere in this summary way against the justice of the case, for if we did, we should be leaving the wife without any protection against wrong-doers.—Rule discharged.

2. *INMELL V. NEWMAN.* E. T. 1821. K. B. 4 R. & A. 419.

Husband and wife lived separate, under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation she or he, in his right might be entitled to, and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings, to be brought in his or their names, for recovering such real or personal estates; and the wife having, as executrix of A. B., commenced an action on a promissory note against defendant, in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrin continuance*. A rule had been obtained, calling upon the defendant to show cause why the plea should not be taken off the record, and the release be delivered up to be cancelled. *Per Cur.* Whilst the husband continues to relinquish his marital rights, it would be contrary, both to equity and justice, if we were to allow him, in direct violation of the contract which he has made, to execute a release of this sort, and thereby to render the suit commenced by his wife, in her character of executrix, utterly unavailing. It would operate as a fraud upon the persons having an interest under the will of the testator.—He may, perhaps, be entitled to intercept the money, if recovered, but being named in this suit, under such circumstances, and merely for conformity, we must make the rule absolute. See 1 B. & P. 417; Jenkin's Rep. 79.

3. *CHAMBERLAINE V. HUETSON.* H. T. 1695. K. B. 5 Mod. 70; S. C. 1 Salk. 115; S. C. 1 Ld. Raym. 73; S. C. 12 Mod. 89; S. C. Holt. 99.

A libel, *ex officio*, against Chamberlaine, had been admitted for incontinency, at the promotion of Mrs. Huetson, whereon a sentence was given, and penance enjoined; and, according to the course of the Court, costs awarded to Mrs. Huetson, who was not divorced *a mensa et thoro*, from her husband; the husband releases the costs to Chamberlain; she pleads this in the Ecclesiastical Court, and the plea being refused, she prayed a prohibition. *Holt, C. J.* If a *feme covert* sues for defamation in the Spiritual Court, and there obtains sentence, and costs are given, if she cohabits with her husband at that time, he may release them; but if she be divorced *a mensa et thoro*, though the marriage still continues, he cannot; because if there is a divorce, the husband is to allow the wife alimony; and if she has alimony, the costs expended in the suit are supposed to issue out of it, and therefore the husband cannot release it, because she has it separate; which is the reason, though not mentioned, of Motam's case. 2 Roll. Abr. 301; because there is not alimony; and if he may release the duty he may release the costs. Therefore, in this case he may release the costs, there being no divorce; I think a prohibition must be granted. But *Rokeby*, on account of the scandalousness of the cause, was against it; and afterwards a proposal was made for bringing money into court, for Mrs. Huetson to take out as she had occasion, to carry on the charges of the prohibition, and then to declare; but the matter was not afterwards moved.

3d. WHERE MARRIAGE ABATES THE SUIT, AND PROCEEDINGS UNDER IT.

1. *LORD SUTHERLAND'S CASE.* E. T. 1730. Ex. Bunb. 282.

In this case the plaintiff's wife obtained an interlocutory judgment against

from her husband in his name, [105] for an injury to her property upon the defendant's application supported by the husband's affidavit, that the suit has not his sanction.

And where the husband by deed of separation relinquished all his marital rights and control over the wife, she having as executrix commenced an action in the names of her husband and herself, and the husband having released the debt, which was pleaded *puis darr. cont.* the Court held that the husband [106] could not so defeat the action.

So the husband cannot release costs allowed in the spiritual court to his wife, in a suit pending there.

If a *feme* plaintiff marry after interlocu-

tery, but before final judgment, the suit does not abate.*

the defendant, and, before final judgment, married; and after final judgment the husband and wife brought a *scire facias* thereupon, for the defendant to show cause *quare executio n. n.* &c. Afterwards the defendant moved to set aside the judgment; but the Court refused to do it upon motion, and put him to his *audita quærela*. See ante, vol. i. p. 17. n

2 BULLER v. DE PINNA. M. T. 1730. K. B. 2 Stra. 830.

But a writ of error does.†
[107]

A writ of error brought by a *feme sole* abated by her marriage, and then she and her husband brought a second; and the Court gave leave to take out execution, it being a delay occasioned by the act of the plaintiff in error. See 1 Stra. 633.

3. ANON. H. T. 1701. K. B. 1 Salk. 117.

A warrant of attorney given to a *feme sole*, is not revoked by her subsequent marriage.

A warrant of attorney to confess judgment to a *feme sole*, who afterwards married. The Court gave leave, notwithstanding the marriage, to enter up judgment; for such an authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage.

4th. DECLARATION BY.*

1. RIDGWOOD v. WAY. M. T. 1773. Ex. Ch. 2 Blac. 1236.

A declaration by husband and wife must state the interest of the wife.‡

This was a writ of error from the King's Bench. The defendants in error being plaintiffs below, brought an action on the case against the plaintiff in error: Ridgwood, and declared for the occupation of a messuage and lands at Tiverton, and for money had and received to the use of Way and his wife, on which was founded the *assumpsit* to both Way and his wife. Judgment by default for both; and on a writ of inquiry, damages 5*l.* 4*s.*; costs 40*s.*; final judgment signed for 5*l.* 4*s.* debt, and 9*l.* 16*s.* costs, the 5th of December, 1777. The error assigned was, that judgment was given for Thomas Way and Sarah his wife, to recover their damages, whereas it appears upon the record, that Sarah was the wife of Thomas, and could not sustain any damages by reason of any thing contained in the declaration. *Per Cur.* This judgment is erroneous, because no contract can be made with a married woman; no promise, either express or implied, gives any interest to her. The whole results to the husband, and the action must be brought in his name only. The remedy, if the contract be his, goes after his death to his administrators; if a joint contract, it survives to the longest liver of the husband and wife, and therefore the distinction is sensible, and necessary to be made. It has been insisted, that the Court may intend the estate in question to have been the wife's; but there can be no intendment contrary to the plain meaning of the

* So marriage after verdict, and before the day in bank does not abate the suit, 4 H. 4. c. 1; 1 Sid. 143; Th. D. 1. 12. c. 12. s. 5. Nor a marriage after judgment, and before execution in an appeal; 11 H. 4. 48. b; 21 Edw. 4. 87; Th. D. 1. 12. c. 12. s. 6. Nor a marriage after summons and severance; 10 Rep. 134. b. But if a *feme sole* plaintiff obtain judgment, and marry before execution, a *scire facias* must be sued out in order to make the husband a party to the judgment; 2 Saund. 72; Th. Brev. 256; and if after execution awarded on this *scire facias*, but before execution the wife die, the husband alone may have execution upon the judgment, without even taking out administration; 6 Bac. Abr. *Scire Facias*. b. 6; 1 Salk. 116; Comb. 435; Carth. 415; Skin. 682. So if the husband and wife obtain judgment for a debt due to the wife *dum sola*, the husband may have a *scire facias* to execute the judgment; 1 Sid. 337; Cro. Eliz. 844; 3 Mod. 189; 1 Mod. 179; Cro. Car. 209; 2 Leon. 14; 4 Leon. 186; or he may, it seems, sue out execution in the names of himself and wife, without a *scire facias*. But if the husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband shall have the *scire facias*. Cro. Car. 207; Jones. 248; 6 Bac. Ab. *Scire Facias*. b. 6.

† So a *feme sole* marrying is a revocation of the arbitrator's authority; Samin v. Norton, 3 Keb. 9; abridged ante, vol. ii. 126. Hence the Court held an award for the payment of a sum of money, under such circumstances, to be void; but that the marriage itself was a breach of the covenant to abide by the award, on which latter ground the plaintiff had judgment; Charneley v. Winstanley, 5 East. 263; abridged ante, vol. ii. 126.

‡ Declaration at the suit of husband and wife cannot be delivered on process at his suit only; post, tit. Declaration.

§ For the Court will not intend it on a demurrer; 2 N. R. 405; or even after verdict; Cro. Jac. 641; but the latter proposition seems doubtful. See Courne v. Mattaire, MS. Bull. N. P. 52.

words. Besides, these are general damages, and the count for money had and received cannot be supported by intendment; neither can the insertion of the wife be deemed surplusage. It creates an interest in the wife, and entitles her to the damages by survivorship.—Judgment reversed.

2. *RUSSELL v. CORNE*. H. T. 1702. K. B. 2 Ld. Raym. 1031. S. C. 1 Salk.

119. S. P. *BAKER v. BAXTER*. M. T. 1690. K. B. Comb. 184.

In trespass, assault and battery, brought by *baron* and *feme* for the battery of the wife. There were several counts laid in the declaration, which were singly for the battery of the wife. But there was one count for beating her, whereby the business of the husband had remained undone, and the declaration concluded to the damage of them both. On not guilty pleaded, a verdict was given for the plaintiff, and entire damages. The defendant's counsel took an exception in arrest of judgment, that the husband and wife cannot join as this count is laid, for the wife cannot join for the damage accruing to the husband by the loss and delay of his business, in which she has no interest.

Per Cur. If it had been, whereby he had lost the benefit of her society, the wife could not have been joined. There, the *whereby*, &c. is the gist of the action to entitle the husband to maintain an action without his wife. But now, in this case, we will not intend that the judge allowed any evidence to be given as to the special damage to the husband, but only admitted proof as to the battery. We do not know what they mean by saying, whereby his business remained undone, &c.: a woman is to comfort her husband. In this case the gist of the action is not the *whereby*; but if the husband had brought the action, then it would have been the gist. There was a case, (*Easter. 7 W. 3.*) trespass brought by the *baron* alone, for breaking his house, and beating and wounding his wife, and imprisoning her for three hours, and also for detaining the possession of the house, and for menacing his wife and servants, whereby his business remained undone. It was moved in arrest of judgment, because that for some of these wrongs, as the beating and imprisoning his wife, the wife ought to be joined. But judgment was given for the plaintiff by *Eyre* and *Rokeby*. *Holt*, doubting; for they held, that the *whereby* went through the whole count. The plaintiff, in the principal case, had judgment *nisi*, &c.

In an action by *baron* and *feme* for the battery of the wife, the declaration charging under a *per quod*, that the husband's business remained undone, and concluding *ad damnum ipsorum*,

3. *TODD v. REDFORD*. H. T. 1708. K. B. 11 Mod. 264.

Action of assault and battery by husband and wife. The declaration set forth, that the defendant, on such a day, &c. assaulted the wife, and driving a coach over her, bruised her, &c. by reason whereof the husband laid out divers sums of money for the cure, &c., and other injuries did, to the great damage of them both. The defendant pleaded in abatement, that his name was Redborn, and not Redford; and on issue, and a verdict for the plaintiff, the defendant's counsel moved in arrest of judgment; and objected, that in this case the husband and wife should not have joined, because the damage is laid to be for the money laid out in the cure of the wife as well as the battery; and entire damages being given, it is bad for the whole; and cited 1 Sid. 328; Yelv. 106; 2 Vent. 29; 2 Cro. 625; 1 Lev. 3. But the husband should have sued alone for the money laid out in the cure. *Powell, J.* said, that where the husband and wife join in an action of assault and battery for beating both, it is wrong, but it may be helped by a verdict, separating the damages: and here the gist of the action is only the beating of the wife, and the by reason whereof, &c. is only in aggravation of damages. As to the other injuries, it is too general to suppose damages given for it. He said also, that husband and wife cannot join in assault and battery, whereby he lost the benefit of her company, for the *whereby* in such a case is the gist of the action; and in the case at the bar, if the *by reason whereof* had been left out, the surgeon's bill might have been given in evidence, in aggravation of damages.—Judgment for the plaintiff.

Or a declaration stating that the defendant drove a coach over the wife and bruised her, by reason whereof the husband laid out, &c. for her cure, *et alia enormia iisdem intulit ad grave damnum ipsorum*.

4. *HOCKETT v. STIDDOLPH ET UX.* H. T. 1674-5. 2 Mod. 66; S. C. 2 Vent. [109] 29; S. C. 1 Vent. 93. 328.

In assault and battery by plaintiff and his wife, against defendant and his wife, Or a declaration.

ration for an assault and battery by *baron and feme* alleging it to have been committed on both, are cured by verdict.

wife, the plaintiff proved the battery of his wife only, and had a verdict; but as to the residuum, the defendants were acquitted. It was contended on a motion in arrest of judgment, that the declaration was bad; for the husband ought not to have joined with his wife, but should have brought a separate action for the assault on-himself, and that the finding of the jury would not aid the mistake. Put, *Per Cur.* Such an objection cannot be taken to this declaration after verdict, as all irregularities are cured; therefore the plaintiff must have judgment.—Judgment for plaintiff. See 12 Mod. 19. 207; 1 Lev. 3; 11 Mod. 264. 273. 1 Roll. Abr. 781; March. 134; 10 Mod. 145. 184. 229; Fitzg. 174. 275; 8 Mod. 3. 26. 49. 200; Stra. 61. 229. 1006. 1094; 3 T. R. 627; Ld. Raym. 669. 1031. 1050. 1061. 1208.

5. PARRY v. HINDLE. M. T. 1809. C. P. 2 Taunt. 180.

A demise by a woman before marriage should be stated in an

In giving judgment in this case, *Lawrence, J.* said, that though a man seised of property in right of his wife, usually demise in his own name during the coverture, yet if the demise was granted by the wife before marriage, it might be well to state it to have been done by *husband and wife*.

action during coverture to have been made by husband and wife. *Qu.*

5th. PLEAS TO ACTION BY; OR WHEN THE FEME SUES ALONE.*

1. WOOD v. AKERS. M. T. 1798. N. P. 2 Esp. 594.

To an action by husband alone, the defendant cannot plead as a set-off, a debt due from the wife *dum sola*.

Assumpsit for money lent, and goods sold and delivered by the husband. Plea, *non-assumpsit*, with notice of set-off of a sum of money paid by the defendant to one A. for plaintiff's wife before her intermarriage. Plaintiff's counsel objected to the set-off, as the present action was by the husband alone; and to make the set-off available, the action ought to be against the husband and wife. *Eyre, C. J.* said, the law is certainly as stated by the plaintiff's counsel; but, nevertheless, the husband having given directions for the money to be paid, he has made it his own, and the defendant is therefore entitled to set-off.—Verdict for plaintiff for residue.

2. PITTAM v. FOSTER. H. T. 1823. K. B. 1 R. & C. 248; S. C. 2 D. & R. 363.

A. and B. drew a joint promissory note, six years elapsed without an acknowledgment being given by them, but after the marri-

Declaration in *assumpsit*, on a promissory note made by A. and B. prior to B's marriage with one C. against A. C. and B. 1st plea, general issue. 2d plea, *non assumpsit infra sex annos* by A. and B. the wife of C. 3d plea, *actio non accrevit infra sex annos* by all the defendants. Replication joining issue on all the pleas. At the trial it appeared that no promise had been made before the marriage, (which was then clear from the date of the note) but that about three or four years back, A. long after the marriage of B. but within six years therefrom, had promised to pay the debt. It was objected on the part of the defendant, that inasmuch as there were not any counts in the declaration containing promises made after the marriage, the evidence was not sufficient to take the case out of the statute of limitations. The learned judge

* When the wife has no interest in the subject matter of the suit, and consequently ought not to be made a party, and she sues either with or without her husband, the plaintiff will be nonsuited on the general issue. But where the wife was interested *before* or *during* her coverture in the cause of action, and might join with the husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue, or pleaded in bar, at least this rule obtains in action *ex delicto*; *ante* 102; and if the plaintiff marry after suing out the writ and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement; *ante* vol. i. p. 17; as matter arising before plea, or pending the suit, or *puis darrien continuance* if after issue joined. Coverture is no plea, where the husband is banished or transported; Co. Lit. 132. b; R. Mod 851; 2 H. 4. 7. a; Lofft. 142; or has abjured; Co. Lit. 132. b. 133. a; or if there be a divorce; *sed vide* 3 B. & C. 291; S. C. 5 D. & R. 98. But to an action by husband and wife, it may be pleaded that she was not *covert* at the day of the writ purchased; Th. D. b. 11. c. 2. s. 8; or that they were not married; 3 Salk. 64; S. C. 12 Mod. 276. Or that they were divorced, 9 Edw. 3. 32. So coverture is a plea, though the wife lives apart with a separate maintenance, *Marshall v. Rutton*, 8 T. R. abridged *ante*. So, though the husband has deserted her, and gone abroad; *Baggett v. Frier*, 11 East. 301. abridged *ante*; or has abandoned her for adultery, *Marshall v. Rutton*, 8 T. R. 547. abridged *ante*; or resides in an enemy's country, not with a view of adhering to the enemy; 2 B. & P. 226; or as a foreigner resident abroad; 1 B. & P. 357; *contra* 3 Campb. 123.

over-ruled the objection, and the jury found a verdict for the plaintiff. Cause was shown against a rule for setting aside the verdict, and entering a nonsuit; and it was contended that the time of the marriage was immaterial, and that a promise by one of the co-defendants was the promise of all of them. *Per Cur.* We cannot consider that as an immaterial allegation; because it is clear that a promise made by B. express or implied, would not after marriage be sufficient to sustain the action. The case of *Ward v. Hunter*, (6 Taunt. 210.) is decisive of the question. That was an action by an executrix on promises made to the testator. Plea, statute of limitation. Plaintiff relied upon defendant's having said to her that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a nonsuit; and the Court said when the Courts determined that an acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it; and the rule for a nonsuit was made absolute. But even could such a promise be made available, it is impossible, as the pleadings now stand, that the action can be sustained.—Rule absolute. See 3 Rep. 409; 2 Doug. 652; 1 B. & A. 93; 2 Lord Raym. 1101; 6 Mod. 309; 1 Salk. 28; 3 East. 409; 1 Taunt. 212; 6 T. R. 680.

6th. REPLICATION IN ACTIONS BY.

To a plea of coverture the plaintiff may reply that she is sole; Ast. Ent. 9. 10; or that her husband is dead, and that she is now sole: 9 H. 5. 1; Th. D. 1. 12. c. 12. s. 7; or that there is a divorce between them, *ibid*; that the day of the original purchased *et semper postea*, she was sole, and not covert, &c.; Ast. Ent. 9. So if the replication be that after the original purchased *non cepit vivum* it is well; R. Lut. 1640; Ast. Ent. 10.

7th. EVIDENCE IN ACTIONS BY.

(a) *By husband and wife jointly.*

1. DICKENSON v. DAVIS. M. T. 1721. K. B. 1 Stra. 480.

Trespass by husband and wife for an assault on the wife, and under the plea of not guilty, the defendant would have given in evidence, that the man had a former wife a ill living, and that therefore the defendant could not have been guilty of such a beating for which the plaintiff was entitled to damages; and not guilty does not go barely to say, I did not beat this woman; but I did not plaintiff's wife.

Sed Per Pratt, C. J. I can never allow it; you might have pleaded this in abatement, and then they would have had an opportunity to meet you upon that question; whereas if I was to let you into it now, the most honest couple in the world may be branded for adulterers. See Bul. N. P. 20; Cro. Jac. 655.

2. ALBAN v. PRITCHETT. E. T. 1793. K. B. 6 T. R. 630. S. P. WINSMORE v. GREENSBANK. Willes. 577.

In an action on a promissory note brought by husband and wife in right of the wife, who was an executrix; it was holden that no declarations of the wife could be given in evidence by the defendant, for the husband being one of the plaintiffs, has an interest in the case, &c. and that cannot be prejudiced by an act, or by the evidence of his wife, and it was immaterial that his right was *jure uxoris*. See 3 V. & B. 165; Bul. N. P. 28; 4 Camp. 70.

3. AVISON v. LORD. KINNAIRD AND OTHERS. H. T. 1805. K. B. 6 East. 188; S. C. 3 Smith. 286.

This was an action by a husband on a policy of insurance on the life of his wife. The surgeon who had been called in at the time that the assurance had

It is unnecessary, unless the defendant deny the marriage by plea in abatement, to give any evidence of it.

The wife's declaration's suing with her husband are inadmissible.

But it has since been

* Where the action is brought in respect of an injury done to the wife, as by slander or imprisonment, and consequential damages to the husband are also laid, for which he ought to have sued alone, no evidence ought to be given of such special damage, and the defect will be aided by a special verdict confining the damages to the detriment of the wife; 2 Mod. 66; 2 Lev. 101; 1 Lev. 3; Com. Dig. Pleadar, C. 87. See 11 Mod. 264; Stra. 1094; 1 Salk. 119; 2 Salk. 642. ante, p. 109.

† So proof may be admitted on the part of the plaintiff, of the wife's declaration's, as to her intention and purpose in leaving his house, to rebut all suspicion of connivance; *Heare v Allen*, 3 Esp. 276. abridged ante, vol. 1. 298.

holden, in an action by a husband, on a policy of insurance on the life of his wife, that the declaration of the deceased wife as to her state of health when ill in bed, might be adduced in evidence against the husband on a warranty of good health.

been effected, and who had certified as to her health, had been brought forward by the plaintiff at the trial to prove the fact of his wife having been in a good state of health at that time. He stated, that he never was more satisfied in his life of the convalescence of a party, and in opposition to what was sworn, on the part of the defendant's witnesses, who had been called to prove that the plaintiff's wife had acquired a habit of drinking which at that time had impaired her constitution so as to render her life not insurable, and that she died about six months afterwards; he gave evidence to the following effect; that her pulse was good, and that he never knew any persons affected with liquor, but what it was discoverable in their pulse; but added, that he formed his opinion from an examination of her general appearance, her complexion and other circumstances, and principally from the satisfactory answers she gave to his inquiries. The principal question, however, arose on the evidence of A. B., who had been called on by the defendant, and who said that she saw the plaintiff's wife, a day or two after her return from M. where she went to obtain the certificate of her health; that she called on her, not knowing that she was ill; that she found her in bed at 11 o'clock in the forenoon, that she spoke very faintly, and said that she was very poorly; that she had been to M. to get her life insured; that she was poorly when she went; that the policy would not come back from London (to which place the agents of the insurance office of M. had written; to get it effected) in less than ten days; and she was afraid she should not live till it came back, and if that were the case, her husband would not get the money. The counsel for the plaintiff objected to this evidence, as to the declarations of the wife, which they said should not be received either for or against her husband; but the judge held that as the evidence of the surgeon who examined her at M. was founded in a great measure on her representations of the state of her health; and as the general opinion of a surgeon concerning the state of the health of any person must partly be formed upon the statement of the party himself, the evidence was admissible. The jury were then directed to consider whether this habit of excessive drinking was formed by the plaintiff's wife at the time of the insurance, and whether any mischief was done by it to her constitution; so that unless she abandoned it, she would not be in good health. A verdict was found for defendants. A rule had been obtained to set aside the verdict, and grant a new trial on two grounds; 1st, on account of a misdirection by the judge, namely, in drawing the attention of the jury to the moral habits of the plaintiff's wife at the time of the insurance, rather than to her actual state of health, (but it appearing that he had left it to the jury to say whether the excessive drinking had impaired her constitution; this point was abandoned); and 2dly, upon the ground that the evidence of A. B. ought not to have been received.

Per Cur. The question now before us is not whether the mutual confidence between husband and wife should be broken, and whether by the disclosure of the testimony now disputed; the means should be afforded of wresting from the bosom of the wife those secrets which were deposited there by the husband in the unrestrained communications of family intercourse. It is on the contrary now only required, that a sick person should be heard to state that which at all times patients have been admitted to state, namely, the cause, the rise, and the progress of their malady, and the period at which to fix the commencement of those symptoms which mark the nature of the disorder, with which they are afflicted. To this extent only, and no further, is the evidence applied. Besides, this evidence is clearly admissible, for if the plaintiffs produced the surgeon as a witness to show, from his examination of the wife, and what she told him, that she was in a good state of health, and an insurable life. This was but a sort of cross examination as it were of the same witness, to show from what she had said of herself to another person, that she was not really well when she told the surgeon so on that day. A person was attesting witness to a bond; after his death it was necessary to prove his hand-writing as attesting witness; proof was therefore given of his death; but the judge per-

mitted the following evidence to be given, "that the attesting witness had in his dying moments begged pardon of heaven for having been concerned in forging the bond," upon this principle, that if the deed had been put into his hands at the trial, the questions to which the forgoing communication applied, might have been asked him, (cited by Lord Ellenborough, 6 East, 195; S. C. 2 Smith, 293.) But, however, independently of such authority, if this woman's declaration's to the surgeon, given at a contemporary period nearly, are received, her declarations given to A. B. show that she was at least not wholly to be believed. And therefore, as this does not break in upon the principle of keeping inviolate the confidence of private life for the preservation of matrimonial comfort, we are of opinion that this statement by her, nearly cotemporary to her examination by the surgeon, of a fact which must be known to her particularly and personally, must be admissible.—Rule discharged.

See 3 Burr. 1255; 2 T. R. 263; 5 id. 512; 6 id. 680; 1 Str. 520; 2 id. 1042; Rep. Temp. Hard. 267; 4 B. & A. 53.

(b) *By husband alone.*

NEWMAN v. SMITH. T. T. 1705. K. B. 2 Salk. 642.

Trespass *de eo quod the defendants tiel jour et ann, apud W.* upon the plaintiff *insult. fecer. et ipsum verberaver. &c. Ita quod de vita, &c. et domum ipsius quer. apud W. præd. adhuc et ibidem freger., et intraver., et quer. in quiet. usu et occupatione domus præd. disturbaver. et impediver., necnon in præd. quer. et filium suum et M. N. et R. N. filias præd. quer. et E. N. servam suam minas de verberatione eorum adhuc et ibidem imposuer., et ipsos injuriis et gravaminibus; viz. insult. et affraus adhuc et ibidem effecer. Et alia enormia, &c.* Upon not guilty, a verdict was found for the plaintiff; it was moved in arrect of judgment, upon Cro. Eliz. 501. that the master could not maintain trespass for beating his servant or children without special damage, which ought to be specially showed. To which it was answered, and so it was resolved, that the action was for the breaking and entry, and the farther description is only to show the Court how enormous that trespass was; and the plaintiff could not recover damages for losing the service of his children or servant, nor could that be given in evidence, because the plaintiff might have a proper action for that purpose. But the circumstances mentioned might be proved in evidence to aggravate damages for the defendant's trespass by breaking and entering. And whereas it was said, *ibidem* refers to the will, and it should be *in domo prædict.*, it is plain the *adhuc* ties it to the same point of time.

2. HALL v. HILL. T. T. 1737; K. B. 2 Stra. 1094.

In an action for wages earned by the plaintiff's wife of the defendant's intestate, Lee, C. J. would not allow the wife's acknowledgment of the receipt of 20*l.* to be given in evidence against the husband.

3. CAREY v. ADKINS. M. T. 1814. K. B. N. P. 4 Campb. 692. S. P. ANON. M. T. 1700. 12 Mod. 646.

In an action by husband alone to recover money taken from the plaintiff's wife, on the ground that it was the produce of goods she had been concerned in stealing. *Lrd Ellenborough, C. J.* was of opinion that what she said afterwards, when examined on the charge of being concerned in the robbery, respecting the money which never appeared to have been in the husband's possession, was evidence for the defendant.

* And although the contrary has been holden; 2 Salk. 624; it seems the husband may, right to re in an action of trespass for breaking and entering his house, give in evidence loss of service, cover, the or other consequential damage, which has occurred from a trespass on his wife or daughter; 2 T. R. 166; 2 N. R. 476. In an action by the husband for the service or labour of of the wife his wife, a receipt given by the wife is not evidence; Bull. N. P. 136; unless, perhaps, are good there be some evidence to show that the husband had constituted her his agent; see *post*, tit. evidences. Receipt; and Hall v. Hill, *post*, 114.

† And in an action for adultery, a confession of the wife is not evidence; but a discourse between her and defendant is admissible, or letters written to her by the defendant; Baker v. Morley, abridged *ante*, vol. i. p. 297; or letters written by the wife during an absence from her husband, may be produced in evidence to show her feelings towards him; Edward v. Crook, 4 Esp. 89. abridged *ante*, vol. i. p. 297; provided it can be proved that they were not written subsequently to their date; Trelawny v. Colman, 2 Stark. 191. abridged *ante*, vol. i. p. 298.

In trespass for breaking and entering plaintiff's house he may prove the assaulting and menacing his wife servants, and children, in aggravation in order to show the enormity of the trespass;*

[114] In an action by the husband for the wife's earnings, her acknowledgment of having been paid cannot be admitted for the defendant.†

But where a doubt is thrown on his legal

(c) *By wife alone.*

If the wife alone bring an action, and, upon the trial, evidence be given of coverture, which would, being unanswered, show that the wife herself had no cause of action, she may rebut that evidence by proof of the husband's civil death by exile and abjuration, or transportation for felony; *Belknap's case*, 2 Hen. 4. 7. a. As where a married woman brought an action for goods sold, &c. and the defendant proved the plaintiff's coverture, and gave in evidence the record of the husband's conviction for felony, and sentence of transportation for seven years, but which term had expired; it was holden, notwithstanding, that this was evidence of the husband's abjuration, and that if he had returned, the *onus* of proving it was thrown on the defendant; *Carrol v. Blencow*, 4 Esp. 27. abridged ante.

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8th. WITNESSES IN ACTIONS BY.

1. *DAVIS v. DINWOODY*. E. T. 1792. K. B. 4 T. R. 678. S. P. *RARKER v. DISCRE*. E. T. 1785. K. B. Ca. Temp. Hard. 264. *WINDHAM v. CHETWYND*. M. T. 1757. K. B. 1 Burr. 414.

The rule that husband and wife can not be witnesses for or against each other is universal.

An action by the executrix of a surviving trustee under the marriage settlement of T. L. (by which certain household goods were settled to the separate use of L's wife) being brought against the sheriff, to recover back the value of some of the articles included in the settlement, which had been sold under an execution against T. L. the husband. The husband was called to prove the identity of the goods, and was admitted at the trial, as he came to speak against his own interest, since if these goods could not be taken to pay his debt, he would be liable; if they could, he would be discharged. But the Court on motion granted a new trial; for they said it was now a settled principle of law that husbands and wives cannot in any case be admitted as witnesses either for or against each other.

Therefore in an action by a *feme sole*, the defendant cannot call her husband to prove she is a married woman.

2. *BENTLEY v. COOKE*, cited in *REX v. CLIVIGER*. H. T. 1788. K. B. 2 T. R. 263. 269.

This was an action by the plaintiff as a *feme sole*, for goods sold, &c. The defendant called the husband as a witness to prove that she was a married woman, and his testimony was admitted, and the plaintiff accordingly nonsuited. On motion to set it aside, the majority of the Court held he was not admissible, on the ground of public policy. Buller J. doubted at first, upon the ground that the husband was not interested in that case; but he afterwards acceded to the opinion of the Court upon the broad principle adopted by them of the impolicy of permitting husband and wife to give evidence for or against each other.

9th. COSTS IN ACTIONS BY.

1. *McNAMARA v. FISHER*. T. T. 1799. K. B. 8 T. R. 302.

The 4 Anne. c. 19. giving costs to the defendant in error where the writ is quashed, &c. extends to a case where the plaintiff is a married woman.

The defendant having recovered judgment, the plaintiff brought a writ of error, without joining her husband, and the writ of error was quashed on the ground that a *feme covert* could not sue out a writ of error without her husband. It was holden that the defendant in error was entitled to costs under the 4 Anne. c. 16. s. 25. on the authority of the case of *Cooper v. Ginger*, 2 Ld. Raym. 1043. where it was determined that the statute was not confined to those cases only where a variance from the original record was assigned an error, but that it extended to all writs of error, by reason of the words in the statute or other defect. See post, tit. Error, Writ of.

2. *JENKINS v. PLUMBE*. H. T. 1702. K. B. 6 Mod. 92; S. C. 1 Salk. 207; S. C. 3 Salk. 105; S. C. Holt, 313; S. C. 11 Mod. 174.

Indebitatus assumpsit brought by husband and wife, who was executrix. Declaration for that whereas the defendant was indebted to them as executor of

Where a wife brings an action jointly with her husband for money had and received to their

* The reason for this exclusion is founded partly on the identity of interest existing between husband and wife, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at a risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same, they are not witnesses against each other, because it is contrary to the legal policy of marriage. It has been resolved, says Lord Coke, Co. Lit. 6. b. that a wife cannot be produced against the husband, as it might be means of implacable discord and discussion between them, and the means of great inconvenience,

J. S. for so much money received by him to their use, as executor, he promised to pay it, &c. The defendant pleaded *non assumpsit*; and on the trial the plaintiff's were nonsuited, and the question was, whether they should pay costs on stat. 23 H. 8. *Per Holt, C. J.* if the receipt was since the testator's death, and by appointment or consent of the executor, there the action must have been brought by him, not as an executor; for the receipt by his appointment, is a receipt by himself. Then if the receipt was without the executor's previous appointment, yet the bringing this action is an assent to the receipt, and makes it a receipt in his own right; so that in either case, the debt ought to be looked on as a new debt, contracted since the death of the testator. And this receipt must be intended to have been in the executor's own time; because the receipt is said to be to the executor's use; and he concluded, that there was no room for the executor here to declare as executor; if there is a receipt by appointment of the executor, it is immediate assets in the executor's hands, and by bringing this action it is in the same manner. And if the executor or administrator bring an action of trover on their own possession, they shall pay costs. Yet there, if the administrator had called himself administrator, and it is so entered on record, and has judgment, and after administration is revoked, the defendant would be relieved by an *audita querela*, because it would appear on the face of the declaration, that he had been sued under that now repealed administration; and the naming himself executor here is not necessary, any further than to show how the original right came. If the executor accounts with the testator's debtor, indeed thereby a new action accrues, but still it is in the right of the testator; and no new contract is made, but only an ascertaining of what was due before. If judgment and execution are in the testator's life, and an action of escape brought in the executor's time, on a nonsuit in this action the executor shall not pay costs; but if he had judgment and execution in his own time, and an escape had happened, for which he brings an action, and is nonsuited he shall pay costs. *Per Powell J.* Where the thing sued for is assets in the executors or administrators before recovery, there they shall pay costs on the nonsuit; or where the entire cause of action arises in their own time. And it was agreed to have been adjudged, that for the rent accruing in the executor's own time, the executors, if nonsuited, should pay costs; as also, that in covenant with the testator, and breach in the time of the executor, he should pay costs. But it is a quere with me if there be any difference on this account, between covenant for rent on a covenant made with the testator, and debt for rent on a lease with him?

And it was agreed by the whole Court, that the statute, by the words thereof, does not distinguish the case of an executor from any other case; but it was by an equitable construction, resolved so by the judges, for this reason, because the nature or cause of action does not lie in their privity or knowledge.

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And the matter being moved, the case of *Elwis v. Mocato*, in this Court, E. T. 2 Ann. was cited for the plaintiff, which was several counts by a plaintiff's executor, one whereof was an *insimul compulsasset*, who, being nonsuited, paid no costs; which determination was now again agreed to, because there was no new cause of action, but a new action on ascertaining of an ancient cause, which ascertaining leaves it still a debt of the testator's.

And it was agreed now by the Court, that the case of 2 A. 7. c. 15. was a good foundation for this case; for there it was agreed, that a feme executrix cannot give away the goods of her testator, without the consent of her husband; and if he consents to it, then it is he that gives it, so the wife here cannot appoint a person to receive his money, but if he consents then it is his appointment.

And if an executor appoints another to receive a debt of his testator, and he receives it, it is now the same thing as if he had actually received it himself, and then it would be assets in his hands, and by consequence appointing another to receive, who will not repay, is a *devastavit*.

Holt, C. J. strongly inclined, that the bringing of this action was such a subsequent agreement, as would make it assets in his hands from that time. But he agreed no more would be assets in his hands than he recovered, and not

as much as was received and declared for, and even for that he would be liable till after judgment; but immediately after judgment. and before execution, he is liable; whereas a person who sues as executor, though he has judgment, yet till execution, the thing recovered is not assets in his hands; and as if the husband had actually appointed the defendant to receive, he alone ought to bring the action in his own name; so here the *ratihabition* amounting to an appointment, he ought to bring it alone; as if a man enter into my land and take the profits thereof, I may, if I please, charge him in account as my bailiff though there was never any privity between us till the action brought. And whereas it was objected, that if the bringing the action would amount to an appointment, then by bringing the action, the whole would be assets in his hands before any recovery. He answered, that would not follow, for they being non, suited, the matter is set at large again, and he has liberty to sue the original debtor; but if he had judgment, and no execution, or ever like to have any, yet his bringing the action, and having judgment, would discharge the first debtor, and by consequence be a *devastavit* in him; for by the judgment he makes the defendant his debtor, who never owed any thing to the testator. And he quoted the case of Norden v. Levit, 1 Freem. 442; S. C. 1 Eq. C. Abr. 240; which was this; the executor brings an action of trover for a conversion in the life of his testator. and the party being arrested, and insolvent, takes a covenant from him in the payment of so much money in satisfaction, and it was held, forasmuch as this did extinguish the original cause of action, it was an immediate *devastavit*, which judgment was affirmed by the House of Lords: *a fortiori*, in our case, the extinguishment of the original debt by judgment against the present defendant, would be a *devastavit*, and on judgment, not the administrator *de bonis non*, but the administrator of the executor should sue execution. If the executor loses the testator's goods, out of his possession, and declares that he was possessed of so much goods as executor to J. S. and on the evidence it appears that they were his own proper goods; he shall be nonsuited, and pay costs. IIut. 214. 220. If a person as administrator, brings an action of trover on his own possession, and is nonsuited, he is condemned in costs; after the administration is revoked, he shall, by an *audita querela*, be relieved against the costs; and this was the case of Turner v. Davis, 16 Car. 2. And it was laid down for a rule, that where an executor brings an action, in which he need not name himself executor, there, if he is nonsuited, he shall pay the costs. 2 Cro. 361. 229. But Powell and Gould, Js. were of a different opinion, for this was an action to create assets, and not for the recovery of what is so already; and immediately after the receipt, were no assets accrued to the executor. Holt, C. J. said, that the case of Cro. Car. 29, reported to be three against one, in Hutton is two to two; however, he was of opinion, there ought to be no costs; for the ward never came to the actual possession of the executor, and could not therefore be assets in him; as if the testator's goods are taken and converted after the death of the testator, before they come to the actual possession of the executor, they are not assets; and therefore, if it is nonsuited in trover for them, it would be hard to make him pay costs.

3. TILT V. BARTLET. E. T. 1751. K. B. Sayer. 126.

Per Cur. If in an action brought by husband and wife, there be judgment of nonsuit, the survivor is liable to costs, and *pari ratione* wherever costs become due in an action by or against the wife, the survivor ought to receive them. If damages and costs are recovered in an action by or against husband and wife, and the husband die after final judgment, the widow is entitled to the costs as well as the damages, for these must always go together, and consequently as the executor of the husband is not entitled to the damages, he cannot be entitled to the costs.

(K) ACTIONS AGAINST HUSBAND AND WIFE.

1st. WHEN AND IN WHAT MANNER THEY MAY BE SUED.*

(a) *In assumpsit.*

1. DRUE V. THORN. T. T. 1648. K. B. Alleyn. 72.

* A feme covert cannot in general be sued alone; 8 T. R. 545; 2 B. & P. 105; 4 T. R.

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So if an action by husband and wife, they be nonsuited and the wife survive, she is liable to costs.

Assumpsit upon an account stated, and also an *indebitatus* count for goods sold to the defendant. Upon non *assumpsit* pleaded, the jury found that the wife, *dum sola*, was indebted to the plaintiff, for wares sold, &c. and that after her marriage with the defendant, he and his wife accounted with the defendant for the money due, and upon the account being stated, 9l. was found due to the plaintiff, which the defendant promised to pay. On urging this special verdict, it was insisted for the plaintiff, that the debt of the wife was the debt of the husband, and he is to be charged in the *debet delinet*, and that by this account with the husband, he had made the demand his proper debt, and the jury having found an express promise of the husband, he might be charged alone; but it was answered, that the account, did not alter the nature of the debt, but only reduced it to a certainty, and that the verdict did not warrant the second promise, which was for wares bought by the defendant, whereas the jury find they were bought by the wife *dum sola*, and they include both promises, so that if either of them be not made good by the verdict, it is against the plaintiff; and to this the Court agreed, and judgment was given for the defendant.

2. STEPHENSON v. HARDY. H. T. 1773. C. P. 3 Wils. 388; S. C. 2 Blac. 872.

In this case, the plaintiff declared that the defendant was indebted to the plaintiff, in his absence, and at his special instance and request. It was proved at the trial, that the defendant being about to go to Ireland, desired the plaintiff to lend his, the defendant's wife, money, if she should have occasion for it in his absence, which he accordingly did. There was a verdict for the plaintiff, and it was afterwards moved in arrest of judgment, and the case of *Mariott v. Lister*, 2 Wils. 441. was cited and relied on to show that the count was law. *But per Cur.* If goods are delivered to the wife, at the instance and request of the husband, he is bound by contract expressed; if a husband turns his wife out of doors unjustly, and she buys necessaries of life, he is bound to pay for the same by an implied promise; he is also bound by all her contracts for necessary goods during cohabitation; and although the goods be actually delivered to her, yet they are goods actually sold and delivered to him. You cannot make a contract with an infant, but you may plead that you lent an infant money to buy necessaries, according to his state and quality, and that the money was laid out in necessaries; it has been admitted that if the word advanced had been inserted in the count, instead of the word lent, it would have been good, but the word lent is the same as advanced. A loan to the wife at the request of the husband is the same in law, as if the loan had been to the husband himself. A wife may make an inchoate contract, which the husband can afterwards confirm or disaffirm, and here he had, if the expression may be allowed, previously confirmed the contract for the loan. See post, tit. Money lent.

3. MITCHINSON v. HEWSON. T. T. 1797. K. B. 7. T. R. 348.

After verdict for plaintiff in an action of *assumpsit*, for work and labour performed for the defendant's wife, *dum sola*, a motion was made in arrest of judgment, on the ground that the wife ought to have been joined in the action, inasmuch that if the wife died before the action was commenced, he would not have been liable, neither would his executors if he died in the life-time of his wife before judgment; but the action would survive against the wife in the latter case and against his personal representatives in the former. The effect of this action then is to increase the liability which the law throws on the husband.

363; Com. Dig. Pleader, 2 A. C. 2 Camph. 123; and when a feme sole who has entered into a contract marries; Andr. 227; the husband and wife must in general be jointly sued, though the husband state an account, and expressly promise to pay the debt or perform the contract; 7 T. R. 348, 2 T. R. 480, 3 Mod. 186, 1 Keb. 281, 1 Taunt. 217. Hence, if a man marry a woman who is in debt, the action shall be against them both, Thel. Dig. 45, lib. 5, c. 4, s. 19, for, where an action for money due from the wife *dum sola* was brought against the husband alone, the judgment was suspended; Keb. 440, pl. 32, though in an action against husband and wife upon a contract for silks bought of the plaintiff by the wife for her own wearing, and for the money which the feme agreed to pay, three justices held that such contract during coverture could not bind the husband; but admitting it would, they ought not to have been joined; 4 Leon. 42 pl. 118.

And the improper joinder of husband and wife in an action for which he is solely liable, may be taken advantage of on general demurrer.*

If a feme marry during the

[121]
time of the giving and expiration of a notice to obtain double value under 4 Geo. 2. c. 28. she need not be joined in an action to recover it.†

Covenant lies against husband and wife on a demise to her *dum sola*.‡

band, for it is to make him liable though his wife dies. And of this opinion was the Court, who made the rule absolute. See All. 36; 2 Ves. 676-7; 1 Vern. 306. 2 Lev. 107; 3 Lev. 403; 3 Atk. 21; Cowp. 290.

4. MAY v. HOUSE ET UX. E. T. 1781. K. B. 2 Chit. Rep. 697.

Counts for money lent to a feme covert, *dum sola*, laying promises by her before marriage, and also promises by the husband during marriage. General demurrer to the whole declaration. Joinder. It was urged in support of the demurrer, that the husband and wife could not be jointly sued for the demand due from the husband alone. And although it was contended that such defect could not be taken advantage of on general demurrer, but might in arrest of judgment, as before judgment, damages might be obtained on the good counts only, or perhaps on special demurrer. The Court gave judgment for the defendant, the objection being founded upon a defect in substance. Judgment for defendant. See 1 Taunt. 212.

(b) *In debt.*

LAKE v. SMITH. H. T. 1805. C. P. 1 N. R. 174.

The second count of a declaration in debt, on the stat. 4 Geo. 2. c. 28. for double rent, stated, that A. B. being tenant to the plaintiff from year to year of a certain house, &c. determinable at the will of the said plaintiff, or A. B., on a certain day in each year, on due notice given, &c.; and that during such tenancy, and before the intermarriage hereafter mentioned, the plaintiff gave to A. B. such due notice to give up possession of the said premises, on the certain day before mentioned, when the year would expire; and that subsequently to the delivering and making such notice and demand, but before the year ended, A. B. intermarried with the defendant. Demurrer and joinder, on the ground, that as the notice to quit was given to A. B. previously to her intermarriage with the defendant, she ought, for conformity, to have been joined with the defendant in this action.

Per Cur. The offence which the statute intended to remedy is not perfect till the expiration of the time when the notice is to take effect, as it arises on a non-compliance with the terms of such notice; the landlord's right operates on the tenant; and as the defendant married A. B. during the continuance of the tenancy, he became responsible for her obligations, and consequently virtually took upon himself and continued A. B.'s tenancy, with all its consequences.—We, therefore, think the plaintiff should have judgment.—Judgment for plaintiff. See 5 Burr. 3694; 3 ibid. 603.

(c) *In covenant.*

ANON. M. T. 1703. K. B. 6 Mod. 239. S. P. WOOLER v. HALL. M. T. 1669. K. B. 2 Saund. 173; S. C. 1 Sid. 466; 1 Lev. 301.

Covenant was brought against baron and feme, on a lease to feme *dum sola*, wherein she covenanted to plant 20 oaks every year during the term on the premises. It was objected that the wife ought not to have been joined in the action for a breach since the coverture. *Sed non allocatur*, and judgment for plaintiff. And if the wife had assigned *dum sola*, the action would lie against both jointly.

(d) *In detinue.*

Detinue lies against husband and wife for goods taken by the wife before the

* Or made the subject of a motion in arrest of judgment, 2 Com. Dig. 258.

† So debt for rent lies against the husband alone, for rent incurred during the coverture upon a lease to the wife *dum sola*; Tho. Ent. 117, 11 Mod. 169. Or upon a lease which the wife has as executrix or administratrix, *ibid.* or for arrears of rent, of a rent charge, incurred after the coverture, but otherwise for arrears before marriage, Thel. Dig. 45, lib. 5, c. 4, s. 14. So in debt for rent upon a lease made to husband and wife, they may both be joined; 1 Rol. 349, 1, 45, 50; or for rent upon a lease at will to the wife *dum sola*, Co. Litt. 55, b.

‡ But covenant it is said does not lie against baron and feme upon covenant made by them, by deed *indented*; Thel. Dig. 45, lib. 5, c. 4, s. 112; *sed vide ante* 120. n. And it may be stated as a general rule, that where there is a breach of covenant during coverture upon a lease by the feme while *sola*, the action may be against both, or against the husband alone; Com. Dig. Baron and Feme, Y.

coverture; Co. Lit. 351. b.; *sed vide* 1 Leon. 312. But now against them jointly upon a bailment made to the baron and feme; Thel. Dig. 45. lib. 5. c. 1. s. 10; Bac. Ab. tit. Detinue.

(e) *In case.*

1. COOPER V. WITHAM AND WIFE. T. T. 1667-8. K. B. 1 Lev. 247; S. C. Sid. 375; S. C. 2 Keb. 399.

In case, the plaintiff declared that the wife of the defendant maliciously deceived him, by importuning him to marry her, affirming that she was *sole Per quod* he married her, and was troubled in his own mind, and by the husband. Plea, not guilty, and verdict for the plaintiff. On a motion in arrest of judgment it was urged that the action did not lie, for the wife cannot, by any contract or agreement, charge the husband, unless he assents thereto.

Per Cur. This being a matter of crime, must be prosecuted by indictment, no action in such case is maintainable. See Lull, N. P. 32; Yelv. 90; Style. [122] 346.

2. FAWCET V. BEAVRES AND WIFE. T. T. 1671. K. B. 2 Lev. 63.

This was an action on the case, brought against husband and wife for retaining a servant who had departed without licence; and the defendants *satis scientes et machinantes*, to deprive the plaintiff of the service of the said A. *retinuerint et custodiverunt* the said A. *licet sæpius requisitus* to the contrary. Judgment was given by default. On error brought, assigning for cause that the action does not lie, for they do not entice the said servant to go away; and he of himself had deserted the service of the plaintiff, and thereby, being at liberty, it was lawful for the defendants to receive him. *Sed non allocatur*, for the action lies without their incitement, they having no notice that he was the hired servant of another.—Judgment affirmed. Vide post, tit. Master and Servant.

3. BURNHARD V. ORCHARD. M. T. 1652. K. B. Style. 349.

In case for words against husband and wife, the jury found the husband guilty, and not the wife. And the Court held the declaration ill; for this cannot be a joint speaking by husband and wife, and therefore they ought not to be joined in this action, and there ought to be several judgments and damages if you recover; viz. one against the husband, and the other against the wife, but here it is helped by the verdict; and the judgment in effect is but against one of the defendants, and so judgment was given for the plaintiff.

4. HORSEY V. DANIEL. T. T. 1674. K. B. 2 Lev. 145.

In debt on bond against baron and feme, executors, the plaintiff declared for a *devastavit* committed by them; but the Court gave judgment for the defendants; because a *feme covert* cannot waste during coverture, though the wasting of the baron shall charge her if she survive.

(f) *In trover.*

DRAPER V. FULKS. M. T. 1 Jac. 1. K. B. Yelv. 166.

Per Cur. If a *feme covert* take goods and convert them, trover lies against the baron and feme; but the conversion must be laid only in the husband, because the wife cannot convert goods to her own use, and the action is brought against both, because both were concerned in the trespass of taking them.

* At the end of this case is a note stating that no notice was taken that the action was brought against the husband and wife, and that a *feme covert* cannot make a retainer or contract, but says, that perhaps the receiving and keeping him without any contract is a trespass whereof a *feme* may be guilty, sufficient to maintain this action against her; and in general, for torts committed by her during the coverture, she should be included in the action.

† But it has been holden, that an action for waste lies against them both, on a lease made to them jointly; Br. Dette. pl. 217. cites 17 E. 4. 7. So if a man marry an administratrix to her former husband, who had wasted the assets during her widowhood, they must be jointly sued for such *devastavit*; Cro. Car. 693; and generally for torts committed by the wife either before or after marriage, they must be jointly sued; Bac. Ab. Baron and Feme, L.

‡ So it lies against both for a conversion before the marriage; Co. Lit. 351. b; 1 Leon. 312; 2 Saund. 47. h, i; or against the husband alone for a conversion by them jointly, since it shall be intended to be the act of the husband; 1 Rol. 348. 637; 2 Saund. 47. h, i.

If a mercer once charge the husband and wife in trover and conversion for wares deli-

An action on the case does not lie against the husband for his wife, affirming herself to be *sole*, and thereby procuring the plaintiff to marry her. [122]

But it may be supported against husband and wife, for the latter having enticed away the servant of plaintiff.*

But they cannot be jointly sued for slander, or other torts committed by husband alone.

Nor can she be joined in an action for a *devastavit* after the marriage.†

Trover lies against baron and feme for a conversion by the wife.‡ [123]

An avowry
for rent ar-
rear, for
land in
right of the
wife must
be by hus-
band and
wife.

(g) *In replevin.*

In *replevin* the defendant avowed upon the baron in right of A, his wife, because land was given in tail, rendering 20*l.* rent, and conveyed the land to A, feme of the plaintiff, and for the rent avowed upon the baron only, and he prayed aid of the feme, and had it; they came and pleaded an abatement of the avowry, because it was not made upon the feme, and because he had aid of her before; therefore he was ousted of it, and the feme was ousted also, though she did not come till now; *Br. Avowry*, pl. 74. cites 39 E. 3. 15.

(h) *In trespass.*

1. *WHITE v. ELDRIDGE*. E. T. 1698. K. B. 1 *Ld. Raym.* 413.

Trespass
lies against
husband
and wife.*

In trespass against husband and wife. Upon not guilty pleaded, the plaintiff had a verdict. And on motion in arrest of judgment that the wife could not be charged for the trespass of the husband, no more than they could be charged for the conversion of goods *ad usum ipsorum*, the Court overruled the exception.

2. *ANON.* T. T. 1669. K. B. 1. *Vent.* 93. S. P. *HARE v. WHITE AND WIFE*. E. T. 1691. K. B. 12 *Mod.* 19. S. P. 1 *Show.* 350.

And the
feme only
may be
found gui-
lty.

In an action of battery against baron and feme, the jury found the feme guilty only, and not the baron. It was moved in arrest of judgment that this verdict was against the plaintiff, for he ought in this case to have joined the baron only for conformity, and the declaring of a battery by both, the baron being acquitted, he hath failed of his action; and so is the case of *Denny, Yelv.* 106. But the Court gave judgment for the plaintiff, and said the case in *Yelverton* was no authority. See 1 *Browne.* 209.

(i) *In ejectment.*

[124] Actions real for the land of the wife, ought to be against the husband and wife; 2 *Com. Dig.* 252. y.

2d. WHEN THE WIFE MAY BE HOLDEN TO BAIL JOINTLY WITH HER HUSBAND, OR THE WIFE ALONE.

1. *When the wife is exempt from being holden to bail.*

A married
woman
when sued
separately,

1. *PRITCHET v. CROSS*. H. T. 1792. C. P. 2 H. Bl. 17. more fully abridged *post*. On a rule for the discharge of a married woman out of custody, who had been holden to bail *alone*, the Court made the rule absolute, notwithstanding it appeared that she resided at a considerable distance from her husband.

Or jointly
with her
husband, is
privileged
from ar-
rest.†

2. *WHITFIELD v. HOLMES*. T. T. 1666. K. B. 1 *Lev.* 216. S. P. *BLIK v. HALPENN*. E. T. 1734. C. P. Ca. *Prac.* 117; S. C. *Prac.* *Reg.* 65.

A woman; whilst sole, having contracted a debt, the plaintiff after marriage, sued out a writ against husband and wife, and both being arrested, the Court on motion discharged the wife, for the husband only is to be imprisoned.

3. *WATERS v. SMITH*. M. T. 1795. K. B. 6. T. R. 451. S. P. *HOLLAND v. ERESTUNE*. M. T. 1748. C. P. *Barnes.* 100.

If it clearly
appears
that she
was a *feme
covert*, and
obtained
credit as
such.

This was a motion to discharge a *feme covert* from custody. It appeared by the positive affidavit of the defendant, and not denied by the plaintiff, that at the time the debt was contracted, the plaintiff knew the defendant was married.

And the Court said, where it clearly appears that the defendant is a *feme covert*, and there is no contradictory evidence about that fact, the Court are bound to discharge her out of custody, on filing common bail.—Rule absolute.

vered to the wife without the husband's consent, and again deliver to her wares without such consent, he cannot bring another action of trover and conversion against the husband, because the second delivery will be an evidence of fraud and combination between the mercer and the wife, to charge the husband, whom the mercer knew not to be consenting; *Manby v. Scott*, *Bridg. Rep.* 263. And where in trover and conversion against the husband and wife, the husband's name is put in only for conformity to the law, if the wife die before judgment, the action is gone, when judgment is given, it is against both; the wife may be imprisoned and taken in execution as well as the husband; and if she survive, she shall be charged alone, and his executors shall be free; *Manby v. Scott*, *Bridg. Rep.* 263.

* Whether it be for a trespass committed before or after marriage; *Thel. Dig.* 45. lib. 5, c. 4. s. 24.

† This rule prevails whether the process be against her and her husband jointly, or against her alone; see *Cro. Jac.* 445; 1 *Vent.* 49; *Lit. Rep.* 18.

4. EDWARDS V. ROURKE. M. T. 1786. K. B. 1 T. R. 486.

A writ being issued against husband and wife, and *non est inventus* returned as to the former, the latter on being arrested obtained a rule to show cause why she should not be discharged out of custody. On showing cause it was contended, that as the husband could not be found, the only remedy the plaintiff had was to take the wife.

Sed Per Cur. This rule must be made absolute; since the wife has, in contemplation of law, no property of her own, she might, if allowed to be arrested, be kept in prison for life.

5. CROOKES V. FRY. M. T. 1817. K. B. 1 B. & A. 165. S. P. BLICK V. HAT-PENN. E. T. 1734. C. P. Barnes. 67.

A married woman had been arrested for a debt contracted by her whilst single. The counsel, in opposing a rule *nisi* obtained to discharge her on bail, in order to justify the arrest, referred to an affidavit, in which it was sworn that the husband had absconded, and cited the case of *Robarts v. Mason*, *infra*, to prove that the Court would not discharge a wife out of custody who had been arrested with her husband, for a debt incurred before the marriage. But the Court said, it had been the constant practice, where husband and wife had been arrested on mesne process, to discharge the wife, but that the husband could not be liberated without putting in bail for both. The rule was consequently made absolute.

6. TAYLOR V. WHITTAKER ET UX. M. T. 1822. K. B. 2 D. & R. 225.

Husband and wife had been in this case arrested for a debt contracted by the latter *dum sola*. The wife was discharged on bail. A rule which had been obtained to show cause why the bail-bond should not be cancelled, and why the plaintiffs should not pay the costs of the application, was now made absolute by the Court, but without costs, as they said that many persons might doubt whether the wife was not liable to be arrested with her husband for a debt contracted by her when sole.—Rule absolute without costs.

See 3 Taunt. 307.

7. ROBARTS AND ANOTHER. V. MASON AND WIEE. E. T. 1808. C. P. 1 Taunt. 254.

An attorney and his wife having been arrested for a debt contracted by his wife *dum sola*, a rule was obtained for the discharge of the wife, on the ground that a *feme covert* was not subject to arrest, though she might be suable with her husband for such a debt as the present. But the Court were of opinion that as the process was regular, the arrest was a necessary consequence, and that special bail ought to be given.—Rule discharged.

8. HOOKMAN V. CHAMBERS. M. T. 1821. C. P. 6 MOORE. 265; S. C. 3 B. & B. 92.

A motion was made in this case for the discharge of the defendant on common appearance, on the ground that she was a *feme covert*; the affidavit admitted that she had been divorced *a mensa et thoro*, by sentence of the ecclesiastical court, but stated that she had appealed against such sentence, and that the cause of action and the arrest arose and took place pending such appeal. Many cases were cited to establish the sole liability of a *feme covert* in cases of divorce, *a mensa et thoro*, &c.; but the Court adverted to the case of *Marshall v. Rutton*, 8 T. R. 545. by which all the former decisions on the subject had been impugned, and in which case it was decided that a *feme covert* cannot in any case sue or be sued as sole, and also considering the contingency attending the validity of the divorce, in consequence of the appeal, made the rule absolute.

* The only difference between the case of *Crookes v. Fry*, and *Robarts v. Mason*, appears to be, that in the former the wife alone was in custody; in the latter, both had been arrested; but it is conceived, that as this distinction is inconsistent with the regular and uniform practice, and the principles on which the right of a *feme covert* to be discharged is founded, it would scarcely be considered as sustainable, at least it seems it would not be adopted in the K. B.; for Bayley, J. in *Crookes v. Fry*, after referring to the decision of C. P., said, "It has been the constant practice of the K. B. where husband and wife were both arrested on mesne process, that the wife shall be discharged, but the husband cannot be discharged without putting in bail for both."

Even though the process be returned as to him *non est inventus*.

[125]
And the mere circumstance of the debt being incurred by her whilst sole, will not debar her right to be discharged, though her husband has since absconded.

And if a bail-bond has been given, the Court will order it to be cancelled, but without costs.

Though where they have been jointly sued for a debt contracted by her *dum sola*, the C. P. refused to recognise her privilege.*

[126]
But where a *feme covert* has been divorced *a mensa et thoro* but has appealed against the sentence, and pending such appeal has been arrested;

9. MARCH V. CAPEELI, H. T. 1798. K. B. 1 East. 17. n.

Or where the plaintiff gives her credit, knowing

The Court discharged the defendant on common bail, it appearing that the plaintiff, at the time of the credit given to the defendant, knew that she had a husband living abroad, though under terms of separation from her.

her husband was abroad;

10. WARDELL V. GOUCH. T. T. 1806. K. B. 7 East. 532.

Or where a married woman has a settlement by deed of separation, and she is trusted by a creditor knowing her to be

A rule had been obtained to show cause why the defendant should not be discharged out of custody on filing common bail. It appeared that the plaintiff used to supply the defendant with goods, but had been previously informed that she was a married woman, although he had been at the same time told that she had a deed of separation, and a separate allowance.

Per Cur. We must take the rule absolute; as the plaintiffs dealt with the defendant, knowing her to be a married woman; the former practice in such cases of driving the party to his plea of coverture being now relaxed.—Rule absolute. See 7 T. R. 5; 8 id. 545.

married and living separate from her husband, she will be discharged on common bail.*

11. PITT V. THOMPSON. M. T. 1800. K. B. 1 East, 16.

And a mere inadvertent misrepresentation by a *feme covert* of her real situation, will not deprive her of this privilege.

The defendant rented a house; and at the time of taking it stated that she believed her husband, who was a seafaring man, was dead, and she contracted several debts, and passed as a single woman; she being arrested, on a rule for her discharge, it was positively sworn that her husband was still alive.

The Court ordered her to be discharged, on the ground that she incurred the debt without any intention to impose upon the plaintiff, by informing him that her husband was dead.

12. PEARSON N. MEADON. F. T. 1771. C. P. 2 Blac. 903.

[127] And although for merely the privilege of a married woman was conceived to depend upon the notoriety of her coverture.

It was moved to discharge the defendant, Margaret Meadon, arrested by the name of Mary Meadon, on a common appearance, as being a *feme covert*; upon her affidavit that she was married the 30th of October, 1764, at Saint Margaret's, Westminster, to George Frederick Meadon, with whom she has ever since cohabited, and he is generally known to be her husband; but that she was arrested by the defendant, though the cause of action, if any, arose since the coverture, and that the plaintiff then knew her to be the wife of George Frederick Meadon. By the copy of the register produced it appeared, that on the 30th of October, 1764, Frederick Meadon was married to Margaret Hughes; and a bill of exchange also drawn by George Meadon, was produced, which the defendant offered to the plaintiff to be changed for her on the 10th of February, 1772, the day when their dealings commenced.

Per Cur. Where a tradesman gives credit to a woman of genteel appearance for articles of dress, not much beyond her level, (as was the present case the plaintiff keeping a house in Tavistock-street,) and he does not know her to be a married woman, nor does she inform him so, nor is her coverture of such sufficient notoriety, as upon reasonable inquiry he might find it out if, in such a case, he brings his action and arrests her as a *feme sole*, the Court will not interfere in this summary way to deliver a woman in such circumstances, as contributed to impose upon him, but will leave her to plead coverture; though they certainly would discharge a *feme covert* who lived openly with her husband, however the plaintiff might pretend ignorance of it; for then it is his duty to inform himself. But in the present case, from the confusion of the christian names of the supposed husband, it is by no means clear to the Court that the defendant is really a *feme covert*; and if she was, there was not a sufficient notoriety of it to the world, so as to entitle her to her discharge in a summary way; for which reasons the Court does not think it necessary to interpose, but will leave her to her regular remedy.—Rule discharged.

13. COLLINS AND ANOTHER V. ROWED. 1 N. R. 54.

It has been since held on, that a suggestion that the plaintiff was ignorant of the

The defendant in this case was a married woman, and applied, that, on affidavit of her coverture at the time the debt was contracted, and that her husband was still alive, the bail-bond should be delivered up to be cancelled, on

* And it is conceived that the fact of the husband having abandoned her for adultery, would make no difference; Mankall v. Rutton, 8 T. R. 543; abridged *ante*.

entering a common appearance. The plaintiff by affidavit denied knowledge of the defendant's coverture at the period stated, she carrying on business as a *feme sole*. *Per Cur.* Where, as in the present case, the party has not used deceit, the Court will not refuse a discharge because the coverture was not notorious.—Rule absolute.

14. PRITCHETT v. CROSS. H. T. 1792. C. P. 2 H. Bl. 17.

On a rule to show cause why the defendant, who had been holden to bail on the lottery act, should not be discharged out of custody, on entering a common appearance, on the ground that she was married; the Court held it to be a sufficient reason to make the rule absolute, notwithstanding it appeared that she resided at a considerable distance from her husband.

15. CALLARUS v. PLAYER ET UX. T. T. 1823. K. B. 3 T. & R. 247.

It appeared that defendant and his wife had been arrested, that the latter had been discharged on filing common bail, and that the plaintiff had declared against the husband alone. A rule had been granted to show cause why the proceedings should not be set aside for irregularity.

Per Cur. The wife is certainly in court by construction of law, and virtually in the custody of the marshal. The plaintiff, having, therefore, arrested two, and declared against one only, has been guilty of an irregularity.—Rule absolute.

2. When the wife is not exempt from being holden to bail.

1. PARTRIDGE v. CLARKE. E. T. 1793. K. B. 5 T. & R. 194.

An application to discharge the defendant, a married woman, was opposed, because when defendant applied to the plaintiff to borrow money, she had positively denied her being married; and therefore it was contended, that she having been guilty of this fraud, ought not to be discharged on motion, but ought to be left to her plea of coverture in the ordinary course of proceeding; and of this opinion was the Court.

2. SUDEN v. JUSTICE. M. T. 1823. C. P. 8 Moore. 346; S. C. 1 Bing. 344.

A rule nisi was obtained in this case, that the defendant might be discharged on common appearance, and that the bail-bond given by her might be delivered up to be cancelled, on an affidavit which stated that she had been arrested while under coverture, on a claim for the board and lodging, &c. of A. B., whose father was still living, and that the plaintiff knew of the coverture when the arrest took place. To answer this the plaintiff's counsel produced an affidavit of the plaintiff stating that the defendant incurred a considerable debt with him for the board and lodging, without stating that she was married; that he was unaware of her coverture when she contracted the debt, and that he discovered it only accidentally; that the defendant being then questioned as to her coverture, said that she had lived apart from her husband for several years. She afterwards made many promises to discharge the debt, but had quitted England for France, and now resided in Scotland, to avoid the process of the Court. It was therefore submitted that the defendant ought not to be relieved summarily, but should be left to her plea of coverture; in which the Court concurred, stating their general disinclination to relieve on motion in these cases,

* For as the practice of discharging such persons out of custody is founded upon the summary interposition of the Court upon equitable grounds, they will not in general interfere under circumstances of imposition; see 2 Blac. 903.

As was finally determined in Marshall v. Rutton, 8 T. R. 545. abridged ante, that a *feme covert* could not be impleaded as a single woman, while the relation of marriage continued, and she and her husband were living in the kingdom, although she lived apart from him, and had a separate maintenance secured to her by deed; yet the policy of the law, which considers a married woman as incapable of suing or being sued without her husband, we have already seen admits of some modifications from the peculiar situation of the parties, as where the wife has acquired a separate character from the civil death of her husband, by his having abjured the realm; 1 Inst. 133; 2 H. 27; 2 B. & P. 281; Co. Lit. 134; or by being transported either for life or for a term of years; 2 Bla. Pep. 1177; 1 T. R. 6; Loft. 162; or from his not returning after the period of his transportation has elapsed; 4 Esp. 27. Under any of these circumstances, the pre-existing disabilities of the wife are suspended, and she may be sued as a *feme sole* as it is conceived that if she were arrested, the courts would not discharge her on common bail.

And hence a married woman cannot be arrested on a penal statute. [128] And though common bail be on file by a *feme covert* arrested with her husband, she is in the eye of the law in custody, and must be declared against.

A married woman who has obtained credit by willfully misrepresenting herself as a *feme sole*, is not entitled to be discharged from arrest.*

As where a *feme covert* contracted a debt with a person stating her coverture, and evaded payment, and resided out of the jurisdiction of the Court, the Court re-discharge her on a common appearance.

and referred to the case of *Burfield v. De Pienne*, 2 N. R. 380. as conclusive in favour of such opinion.—Rule discharged. See 2 Salk. 646; S. C. *ibid.* 116; 8 T. R. 545; 6 *ibid.* 45; 2 H. Bl. 17; 2 Bl. 1079; 1 B. & P. 10; 1 *ibid.* 8.

3. DE GAILLON v. L'AIGLE. E. T. 1797. C. P. 1 B. & P. 8.

So where the husband is an alien residing abroad, and the wife trades separately on her own account, the Court will not discharge her on a common appearance from an arrest for a debt incurred during such separate trading.

It appeared in this case, that the defendant was a married woman, whose husband resided at Hamburg; that previously to his departure he had empowered her, by letter of attorney, to transact business for him in this country, and under which authority she drew and accepted bills for him. The defendant cohabited and carried on trade with another man; and in the present instance the plaintiff, by letter, had desired the defendant to procure for him goods to the amount of 700*l.* promising to pay immediately on account, 300*l.*, and stating that he should transmit goods to the defendant's husband at Hamburg, who would return such French goods of equal amount as would be most profitable to him. The defendant received the 300*l.* from the plaintiff, who not receiving any goods, pressed for a return of the money, when the defendant paid part in goods, and for the remainder drew bills on her husband signed by her as a wife, and stating the power of attorney. The husband accepted the bills, but refused to pay them on their becoming due; they were consequently protested, and the defendant arrested for the balance due on the whole transaction. A rule being obtained for the defendant's discharge on a common appearance, and for stay of proceedings, on the ground of coverture; the affidavit in its support stated the plaintiff's knowledge of such coverture when she arrived in England, but the plaintiff denied his alleged knowledge of the fact.

Per Cur. This letter is evidence of two separate transactions; the first of 300*l.* was with the wife, and the latter was clearly a distinct concern with the husband, and which was settled by his returning other goods. The wife seems to have traded separately for herself, without any connexion with the husband. The circumstances of these parties being natives of France, where greater privileges are allowed to married women than in England, is worthy consideration; but here the plaintiff traded absolutely on her own account, and must not be allowed to screen herself by her coverture. Rule discharged.

[130]

And the Court will not discharge her, though there is no separate maintenance, if her husband be a foreigner residing abroad.*

4. BURFIELD v. DUTCHESSE DE PIENNE. H. T. 1807. C. P. 2 N. R. 380.

The defendant was married to the Duke De Pienne, and, to avoid the troubles in France came to England, where she remained for safety with the consent of the Duke, with whom she had frequent correspondence; she had never misrepresented herself, nor was separated from her husband by deed, nor had a separate maintenance. On motion for a rule that she be discharged out of custody on a common appearance; Heath, J. said, the Court has before refused this immunity to a foreigner, though her coverture was clearly proved. See *Pitt v. Thompson*, 1 East 16; *Deerly v. Dutchess of Mazarine*, 2 Salk. 646.

5. ENGLISH v. CABALLERO. T. T. 1823. K. B. 3 D. & R. 25.

A rule nisi had been obtained to quash a writ, issued against both defendant and his wife, by means of which, the latter had been arrested alone for a debt contracted by her *dum sola*, upon an affidavit of the former, that before

And where the wife of

* It is observable, that in *De Gaillon v. L'Aigle*, and *Burfield v. De Pienne*, the husband was an alien, resident abroad; and it may be inferred from the decision of *March v. Hutchinson*, 2 B. & P. 226. abridged *ante*, 83. that if the husband was a native of this country, and capable of returning, a different practice would be adopted. In the case just alluded to, we may remember that the husband was an Englishman, and had been employed in the service of the British government in a foreign country, but in consequence of war between the two countries, and the cessation of his employment, he had sent his wife and family home, but continued to reside abroad; it was determined that the lengthened absence of the husband on the Continent did not render her liable to be sued as a *feme sole*. "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal; there is not any case where the wife has been holden liable, the husband being an Englishman;" *Per Heath*, J. 2 B. & P. 233.

and at the time of the arrest he was in the actual employment of the Spanish Ambassador as second secretary, and in daily attendance upon him in writing despatches, and other official documents, negating that deponent was a trader within the meaning of the bankrupt laws. It was urged that the writ ought not to be quashed, upon the ground that the affidavit upon which the rule was obtained, was defective in several particulars; the name of the ambassador was not mentioned; it was not alleged that the defendant was a domestic servant of the ambassador; nor when he was first employed; nor that he was employed in the ambassador's house. At all events, it was contended that the writ could only be holden bad as against the wife, who had been actually arrested. An affidavit establishing that defendant's wife was an English woman, and possessed of property to the amount of 1000*l.* per annum, was produced. *Per Cur.* The defendant does not show that he is entitled to the privilege claimed by virtue of the statute 7 Anne. c. 12. It does not follow that the writ is absolutely void, unless put in force by an arrest, which in this case has not been done. If the husband shall be arrested he may relieve himself by making a better affidavit. In his present affidavit, he does not state when he was first employed; when the ambassador came to this country; nor does he say that he is employed in the ambassador's house; nor that the service of the writ was at the ambassador's house. Rule discharged.

See 3 T. R. 79; 3 Burr. 1478; S. C. 1 Bl. Rep. 477; 3 Burr. 1676. 1731; 4 id. 1481. 2017; 2 Str. 797; 2 Lord Raym. 1524; 8 Mod. 288; 3 Wils. 33; Pr. Reg. 14; S. C. Barnes. 370; Ca. Prac 65; id. 134; S. C. Barnes. 375; 1 B. & C. 554; S. C. 2 D. & R. 833, ante, vol. 1. p. 494.

6. PRITCHARD v. COWLAM. M. T. 1815. C. P. 2 Mash. 40.

A *feme covert* had been arrested as the acceptor of a bill of exchange, at the suit of an indorsee. A motion was made for a rule to show cause why the bail-bond given in this action should not be delivered up to be cancelled, on an affidavit stating that the drawer, when he drew the bill, knew the defendant to be a married woman. *Per Cur.* The rule must be refused. The defendant has represented herself to be a single woman by means of this bill, in such cases the Court has uniformly declined interfering. Rule refused. of exchange, at the suit of an indorsee, on an affidavit that the drawer, when he drew the bill was aware of defendant's coverture.

7. JONES v. LEWIS. T. T. 1816. C. P. 2 Marsh. 385; S. C. 7 Taunt. 55.

A rule nisi was obtained to discharge the defendant on entering a common Court will appearance, on the ground that she was a married woman, but which fact had not only been sworn to by a third person. *Per Cur.* The present defendant is arrested as the drawer of a bill of exchange, at the suit of an indorsee, and as she did not state herself to be covert when applied to for payment, and has not ventured personally to swear to the fact of her coverture, we think, under all the circumstances, we cannot discharge her. Rule discharged. See Hervey v. Cooke, post, 133.

8 HOLLOWAY v. LEE. E. T. 1818. C. P. 2 Moore. 211. Contra, PRITCHARD v. COWLAM, supra.

On a rule to cancel the bail-bond in this case, and discharge the defendant on common appearance, on the ground of coverture; it appeared that the defendant, a *feme covert* had by the name of A., which she bore by agreement with her husband, from whom she was divorced, accepted a bill of exchange drawn on her by one B., and indorsed to the plaintiff's intestate. The drawer proved, that when he drew the bill he knew that the plaintiff was under coverture; and that when he gave it to the intestate, for the purpose of discounting it, he informed him that the acceptor was a married woman, and told him her real name, when he gave him a small sum on the bill, but that the defendant never received any thing from him on account of the bill. The Court were of opinion, that as the parties to the bill were acquainted with the defendant's situation, she must be discharged on common appearance, as the deception necessary to deprive her of her privilege, was not practised in this case. Rule absolute. See 1 N. R. 54.

such acceptance was made, it was holden that the *feme* was entitled to be discharged;

Even

though
at the suit
of the ad-
ministrator
of the in-
dorsee.

9. *HOLLOWAY v. LEE*. E. T. 1818. C. P. 2 Moore. 211.

The counsel for the plaintiff contended, on the facts of the above case, that though, if the intestate had been alive, he would have been hindered, in consequence of his knowledge of the defendant's coverture, from arresting her, yet as the plaintiff claimed in a distinct and representative character, he was entitled to hold the defendant to bail. But the court held that the plaintiff could not be in a better situation than the intestate.

And where
the Court
will dis-
charge her
upon com-
mon ap-
pearance,
they will
order the
bail bond
to be deli-
vered up.

10. *SAMWELL v. JENKINS*. H. T. 1822. C. P. 6 Moore. 500.

Motion for delivering up a bail-bond given by the defendant, founded on an affidavit, which stated that she was married, and resided with her husband; that he being arrested, she had drawn the bill of exchange on which she had been holden to bail, but denied that she had represented herself as a feme sole. It was contended for the plaintiff, that to entitle the defendant to the relief prayed, she must be within the jurisdiction of the Court, whereas she had removed herself from its custody by giving the bail bond in question. But the Court would not allow the distinction, but held that she must, in the eye of the law, still be considered to be in custody; and therefore made the rule absolute.

See Tidd. Prac. 7th edit. 1. 220; 3 Taunt. 307; 2 H. Bl. 17.

3. *How discharged when arrested.**

The hus-
band can-
not be dis-
charged out
of custody
without giv-
ing bail
for himself
and his
wife.

1. *CORNISH v. MARKS*. M. T. 1702. K. B. 6 Mod. 17. S. P. *HARRISON v. BEASCLIFFE*. T. T. 1747. K. B. 2 Stra. 1272.

Per Cur. If a *feme covert* be arrested, let the cause of action be what it will, she shall be discharged out of custody on common bail. But if the husband be arrested; he shall not be discharged by giving bail for himself without giving it for his wife also. See 1 Vent. 49; 1 Mod. 8; 1 B. & P. 165; 1 T. R. 486; 1 H. Bl. 235; 1 Chit. Rep. 75.

2. *COULSON v. SCOTT AND WIFE*. H. T. 1819. K. B. 1 Chit. Rep. 75.

[133]
Though
where, in a
joint action
against hus-
band and
wife, the
former *a-*
lone has

Bailable process having issued against husband & wife for a debt contracted by her *dum sola*, and the husband only arrested, a rule to show cause why a justification for him only should not be sufficient, was opposed on the ground that he must put in bail for his wife as well as himself. But Best. J., after having taken time to consult the judges, said it was sufficient for the bail to justify for him only; but that he must file a common appearance for his wife. been arrested, he may justify bail for himself only, on filing a common appearance for her.

3. *WILSON v. SERRES*. M. T. 1810. C. P. 3 Taunt. 307.

Where a
plaintiff,
with full
knowledge
of defend-
ant's co-
verture, ar-
rested her
as a *feme*
sole, he
was order-
ed to pay
the costs of
the motion
for her dis-
charge.

The defendant, who was separated from her husband, on purchasing goods of the plaintiff, disclosed to him that fact, and stated that she had separate funds, and accepted a bill of exchange for the amount. The bill being dishonoured, she was holden to bail. On motion for her discharge, the Court made the rule absolute, with costs, on the ground that the plaintiff was cognizant of her marriage at the time of procuring the bill and arresting her.

4. *TAYLOR v. WHITTAKER*. M. T. 1822. K. B. MS. 2 D. & R. 225.

Husband and wife having been arrested, a rule was obtained to discharge the latter out of custody; it was submitted, that as it appeared distinctly by the affidavits, that the plaintiff, at the time of the arrest, knew he was proceeding against a *feme covert*, the defendant was entitled to have the rule made absolute with costs. In support of this position, the counsel referred to Wilson v.

* When a married woman has been arrested, either alone or with her husband, and has not by any improper conduct forfeited her right to be discharged, the Court out of which the process issued, ought to be moved upon her own affidavit; Jones v. Lewis, 7 Taunt. 55; S. C. 2 Marsh. 285. abridged *ante*, p. 131; of the marriage, and that her husband is alive, to discharge her out of custody, or if she has given a bail bond that it may be delivered up, to be cancelled, on filling common bail, or on entering a common appearance; Pearson v. Meadon, 2 Blac. 903. abridged *ante*, 127; Patridge v. Clarke, 5 T. R. 194. abridged *ante* 128; see 1 East 16; 1 B. & A. 165. This is the usual practice where the coverture is not doubtful; Pearson v. Meadon, 2 Blac. 903; or she has not obtained credit by artfully representing herself as a *feme sole*; Patridge v. Clarke, 5 T. R. 194; but whenever either of these difficulties arise, the Court, as it has been already seen, will invariably compel her to find special bail, and plead her coverture, or bring a writ of error; Patridge v. Clarke, 5 T. R. 194.

Serres, *supra*, where it was held, that if a plaintiff knowingly arrest a married woman, the Court will make him pay the costs of the motion for her discharge. *Bayley J.* In that case the woman was arrested as a *feme sole*, and not with her husband; therefore that decision arose out of facts different from the circumstances of the present case. In *Wilson v. Serres*, the parties violated a known rule of law. Here they might easily misconceive the practice, and imagine, that as the wife was necessarily made a party to the suit, she might also be arrested.—Rule absolute without costs.

5. HARVEY v. COOKE. E. T. 1822. K. B. 5 B. & A. 747. *Sumb. S. P. ANON.* Lofft. 229.

A. B. having been arrested, had obtained a rule nisi to be discharged, on an affidavit stating that she was a married woman, "as by the certificate annexed will appear," &c. *Per Cur.* The affidavit is insufficient. It is absolutely necessary to swear positively that the party is a married woman.—Rule discharged.

3d. OF ENTERING AN APPEARANCE, OR FILING COMMON BAIL FOR.*

1. RUSSELL v. BUCHANNAN. M. T. 1818. Ex. 6 Price. 139.

The plaintiff having signed judgment for want of a plea, on a rule to show cause why such judgment should not be set aside, it appeared, that the action had been brought against husband and wife, for a debt contracted by the wife *dum sola*; that the husband had entered an appearance for himself only, refusing to have one entered for the wife, whereupon the plaintiff then entered an appearance, according to the statute, for the wife, and declared, to which the defendant pleaded the general issue alone, and the plaintiff signed judgment for want of a plea by the wife. *Per Cur.* The husband might have appeared both for himself and wife. He has chosen, however, to appear for himself only, and not for the wife, and she has not appeared. The plaintiff's course then was quite plain, which was to appear for the wife, according to the statute, and having done so he might declare, and upon no plea pleaded, might properly sign judgment, because the husband having pleaded alone is a nullity.—Rule discharged.

wife for a debt *dum sola*, had been brought, the husband entered an appearance for himself only, the plaintiff then entered an appearance according to the statute for the wife, and declared, the husband pleaded alone, the Court held that the plaintiff might sign judgment for want of a plea.

2. CLARK v. NORRIS. E. T. 1789. C. P. 1 II. Bl. 235.

In an action against husband and wife, after the husband had entered an appearance for himself only, the plaintiff, without making a demand of plea, signed judgment. On motion to set aside the judgment, the Court said the judgment was irregular, and made the rule absolute.

4th. WHEN MARRIAGE ABATES THE SUIT.

1. KING v. JONES. T. T. 1728. K. B. 2 Stra. 811. S. P. 2 Rol. 39.

The plaintiff in error, on a judgment recovered against his wife, assigned for error that she had appeared and pleaded as a *feme sole*, whereas she was married to him, the said Edward King, at the time of her appearance and plea. Jones, the defendant in error, pleaded that the said Edward King and one John Kitson bailed her as a *feme sole*, and, by way of estoppel, prayed they might not be admitted to aver in contradiction to the record; to which King and wife demurred. The judgment was affirmed, the Court observing, that plaintiffs would be badly off, if women, after an arrest were permitted to quash their proceedings by a marriage pending the suit.

2. COOPER v. HUNCHIN. H. T. 1804. K. B. 4 East. 521; S. C. 1 Smith. 282.

Interlocutory judgment had been obtained in an action of *assumpsit* against

* If a *feme covert* be sued alone, she must appear in person; Co. Lit. 135; 3 Taunt. 261; but if the husband and wife be sued jointly, they must appear by attorney; or if *feme sole* marry before appearance or plea, she may appear or plead by attorney without her husband; Ld. Raym. 1525; Stra. 811. But where a *feme sole* marries after issue joined, and has judgment, which is reversed before taking her in execution for the costs in error, the marriage should be suggested on the roll, otherwise an action for false imprisonment lies; 1 Com. Dig. 133. 5th edit.

But where the wife is necessarily a party to the action, the Court, upon discharging her out of custody, will not grant the costs of the application. An affidavit upon which an application

[134] was grounded for the discharge of a married woman, stating that she was such "as by the certificate annexed will appear," was held insufficient. An action against husband and

But a demand of a plea, in such case, is necessary before judgment can be signed.

If a *feme sole* marry, pending an action against her, it will not abate.

[135] Hence where interlocutory judgment has been obtained against a single woman, who

afterwards marries, final judgment and execution against her only are regular.

a *feme*, who afterwards married. The plaintiff, even after notice of the marriage, proceeded to final judgment without joining the husband, and sued out execution thereon against the *feme* only, and took her body in execution. A rule *nisi* had been obtained to show cause why the *capias ad satisfaciendum*, by means of which she had been arrested, should not be set aside. *Per Cur.* The execution must follow the nature of the judgment. The former being against the woman alone, the latter may be so also.—Rule discharged. See 3 Burr. 1471; 8 T. R. 257; 3 P. Wms. 409; Barnes. 207. 210; 1 Salk. 116. 117; 1 Show. 91; Cro. Jac. 323; S. C. B. N. P. 23; 3 Bl. Com. 414.

So when the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor may issue an *habere facias possessionem*, and a *feri facias* against her by the same name.

3. DOE, DEM. TAGGART, v. BUTCHER. H. T. 1815. K. R. 3 M. & S. 557. This was an action of ejectment, which had been brought against a *feme sole*, who had married before trial, and in which a verdict and judgment had been obtained against her by her maiden name, in which name the plaintiff afterwards issued an *habere facias possessionem*; and also a *feri facias*. A rule *nisi* had been obtained to set these writs aside for irregularity, on the ground that a *scire facias* ought to have been sued out, in order to make the husband a party to the judgment, inasmuch as if this execution were well issued, the effect would be to make the husband chargeable in respect of such right as he acquired in the term by the marriage, and also in respect of his goods, for the wife could have no goods. *Per Cur.* The Court need not interfere. The execution may follow the judgment; it not being necessary to join the husband; for this proceeding is not with a view of taking any thing which belongs to the wife. The judgment itself negatives such an inference: it shows that the defendant has no property in the premises, but that they belong to the plaintiff. Unless, therefore, the defendant can by marriage convey to the husband what she never had, there is no interest in either of them. And as to the *feri facias* it is wholly inoperative against the wife, she having ceased to have any goods. and cannot be executed against the husband, for the writ is only to take her goods.—Rule discharged. See 1 Keny. 245; 4 East. 521.

But a writ of error abates by the defendant's coverture.

4. POCKLINGTON v. PECK. M. T. 1725. K. B. 1 Stra. 638. A writ of error was brought on a judgment in C. B. in an action brought there by a *feme sole*. To the *scire facias quare executio non*, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the *scire facias*. On this the defendant in error's counsel moved to quash their own *scire facias*, and the counsel on the other side insisted on costs. *Per Cur.* It is the same in a *scire facias* as in an action where, if you plead in abatement, and the plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we would have made him pay costs. The writ was accordingly quashed without costs.

A declaration against the husband, *pro diversis mercimoniis, &c.* sold, &c. to the wife to the use of her husband, is good.

5th. DECLARATION AGAINST.

1. DYER v. EAST. M. T. 1668. K. B. 1 Vent. 42.

Indebitatus ussumpsit against the husband *pro diversis mercimoniis, &c.* sold and delivered to the wife, to the use of the husband, it being wearing apparel. It was moved in arrest of judgment, that the declaration stating, that the sale was to the wife, though it was to the use of her husband, was ill. But the Court held the declaration good, it being for wearing apparel suitable to her degree.

2. STONE v. MACNAIR. E. T. 1817. Ex. Ch. 1 Moore. 126; S. C. 7 Taunt. 432; S. C. 4 Price. 48.

But a declaration for money lent to a *feme covert* should allege a request there to by the husband or the Court will

Error to reverse a judgment of the Court of K. B. The plaintiff below declared that the money for which the defendant below was indebted to him, was lent and advanced, &c. by him for the use of the defendant's wife, at her special instance and request. The defendant below suffered judgment to go against him by default, and having brought a writ of error, the error assigned was, that it did not appear that the money had been advanced, &c. at the request of the defendant, which was an essential allegation, and without it the plaintiff below could not recover. It was contended for the defendant in error, that if a husband be liable for money lent to his wife, it is immaterial whether the advance is made at his or her request. But the Court fully concurred in the ar-

guments for the plaintiff in error, and the judgment of the Court of K. B. was on error reversed. reverse the judgment, though the defendant below has suffered judgment to go by default.

3. MORRIS AND WIFE V. NORFOLK AND ANOTHER. E. T. 1808. Ex. Ch. 1 Taunt. 212.

Error to reverse a judgment of the Court of K. B. The second count of the declaration stated, that the defendant below, with A. B. his wife, then A. B. spinster, made their certain promissory note, &c. and delivered, &c. to the plaintiffs below, by which note they jointly and severally promised to pay to the said plaintiffs below, a certain sum for value, &c. whenever, &c., by means whereof, &c. And being so liable, *they the said defendant below*, and A. B. his wife, afterwards, and after the intermarriage of the said defendant below with the said A. B., and before payment, &c., undertook, &c. The error assigned was, that as A. B. could not, after her intermarriage, make any promise binding in law, the allegation to that effect was absolutely void. And it was submitted, that the usual mode of declaring in cases of this nature, was to allege a promise by the wife *dum sola*; then her intermarriage, and subsequently the husband's promise; whereas the plaintiff had not made either of these allegations. It was therefore contended for the plaintiff in error, that if an allegation of a promise by a *feme* during coverture were admissible, the greatest absurdity would follow, as it virtually gave to the wife a power of discharging her husband's liabilities, which would be in direct opposition to all the decisions on the subject; for it was held, in *Bidgood v. Way and wife*, 2 Bl. 1236. by *Skynner, C. B.*, that promise could pass to a *feme* covert an interest separate from her husband.—Judgment reversed. See 6 T. R. 680; 2 Stra. 1094; 7 T. R. 349.

So in declaration against baron and feme, for a debt contracted by the *feme* [137] *dum sola*, an allegation of a promise by the *feme* after coverture is bad.*

6th. PLEAS BY† AND REPLICATION TO.

1. LAMBERT V. MARTHA ATKINS AND ANOTHER. M. T. 1809. N. P. 2 Camp. 270. S. P. BALLARD V. GERARD. H. T. 1700. K. B. 12 Mod. 608; Holt. 596; 1 Ld. Raym. 703.

Debt on bond. Plea, *non est factum*. Defence, that at the time of the execution of the deed the defendant was *covert*. Plaintiff's counsel contended, that coverture could not be given in evidence under the plea of *non est factum*, but ought to be pleaded specially; Com. Dig. Pleader, 2 W. 18. I ut *Lord Ellenborough* said, it is laid down there, that defendant MAY plead it specially, and not that he *ought* so plead it. It is clear, that a bond executed by a married woman is void *ab initio*; and it is also clear that that which shows it to be void is admissible in evidence under the plea of *non est factum*. I shall therefore receive the evidence.

Coverture may be given in evidence under the plea of *non est factum*;

2. JAMES V. FOWKS. M. T. 1624. K. B. 12 Mod. 101; S. C. 1 Lord Raym. 83. ANON. M. T. 1703. K. B. 6 Mod. 230.

An action of *assumpsit* was brought against a *feme*, who pleaded coverture at the time of the promise. The plaintiff demurred, because it amounted to the general issue. *Per Cur.* Where it is matter of law that amounts to the general issue, it may be pleaded, and is no cause of demurrer for matter of law, in that case, is matter of fact, which avoids the action, and so may be pleaded, or given in evidence, at the defendant's election.

Or *non assumpsit*.

3. BEAUMONT V. WELDON. E. T. 1690. C. P. 2 Vent. 155.

In *assumpsit* against the husband, the plaintiff declared upon several pro-

And it

* And where the husband is sued alone upon the contract of his wife before coverture, and the objection appears upon the face of the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error; 7 T. R. 348. And if the contract be, in that respect, misdescribed, the plaintiff would be nonsuited. The declaration must allege in the breach that the *feme* did not pay the money before the coverture, or the husband since; see 1 Ld. Raym. 284; 1 Vent. 192.

† If the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, as, in such a case, it cannot be pleaded in bar, or given in evidence upon the trial as a ground of nonsuit; 2 Rol. Rep. 53; Sty- 280; 3 T. R. 631; see *ante*, vol. i. p. 17; and she must plead in person, and not by attorney; Comb. 376; nor can she obtain leave to plead separately from her husband; Ca. Temp. Hard. 101.

HUSBAND AND FEME.—Actions against.

... *lodging for his wife* at his request, and also for goods sold to her. The defendant pleaded in bar, that long before the plaintiff's departure for his wife, she went from him without his consent, and lived in a lottery, &c., and that the plaintiff had notice of her departure, and yet he provided her lodging, and sold to her the wares and goods supposed in the declaration to be sold to the defendant, without any assent or notice of the defendant, and traversed, that he promised *modo et forma prout*, &c. And upon demurrer, the Court, as to the special matter pleaded, gave no opinion, but seemed to think that the special matter would have been good evidence on *non assumpsit* pleaded; and that as to the lodging for the wife, the plea amounted to the general issue. But though it was a fault, yet it was cured by the demurrer; but because he did not answer to the assumpsit laid for the goods sold to himself, they gave judgment for the plaintiff. The reporter adds a note, that as this pleading is, the *absque hoc* amounted to no more than a protestation. See 8 Moore. 354.

4. COWLEY v. ROBERTSON. T. T. 1813. N. P. 3 Campb. 438.
Assumpsit against husband and wife for a debt contracted by her *dum sola*, it was proved, that before her intermarriage with the defendant she was a widow, and that the debt was contracted during that period. The defendant pleaded the general issue, and proved that her first husband was still alive. On it being objected, that such a defence could not be given in evidence under the general issue, and that bigamy was no bar to this action; Lord Ellenborough, C. J. said, I am of opinion that it was incompetent for her to enter into any contract; the previous coverture, therefore, supports the general issue, which is no admission that the defendants are husband and wife.—Plaintiff nonsuited.

5. SNELL v. RICE. M. T. 1794. N. P. 1 Esp. 222.
 This was an action of *assumpsit* against a married woman. Judgment having been signed for want of a plea, defendant applied to the Court to set it aside, which was granted on the following terms: "that she should neither plead her coverture, nor give it in evidence in bar of the plaintiff's action." Plaintiff having established his case, defendant's counsel offered to prove defendant's marriage, and that the goods were furnished on the credit of the husband alone. But Lord Kenyon, C. J. rejected the evidence, and observed that if he admitted it, it would in fact defeat the very end and intent of the rule, for it was granted expressly to prevent her from making any such collateral defence.

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 But where a woman is let in to plead under term of not availing herself of her coverture, she is precluded from showing that the goods were delivered on her husband's credit.
 6. SINCLAIR v. HERVEY. H. T. 1771. K. B. 2 Chit. Rep. 642.
 This was an action of *assumpsit*, for use and occupation of lodgings by A. B. defendant's wife, at his request. Plea, that A. B. was not his wife; demurrer, for that such plea amounted to the general issue, and for that the said plea was immaterial. Joinder. The Court gave judgment for plaintiff. .
 at his request, that she was not the wife of defendant, was holden bad on demurrer.

7. HETHERINGTON v. REYNOLDS. M. T. 1706. K. B. 1 Salk. 8.
 The defendant being sued in the Marshalsea court as a *feme sole*, after having appeared and pleaded to the action, married, and the case was then removed by *habeas corpus* into K. B. The plaintiff declares against her in K. B. as in custody of the Marshal; the defendant pleaded in abatement that she

† To case against husband and wife for *slandorous words spoken by the wife*, they pleaded *quod ipsi non sunt inde culpabiles*, and the jury found *quod ipsi sunt culpabiles*. It was moved in arrest of judgment, that it should have been *quod ipse est inde culpabilis*. Sed non allocatur; for the husband is to pay the damages, and it may be either way, and the finding of the jury is good; 2 Roll. Rep. 433. But in debt against husband and wife, upon a bond of the wife, the defendants pleaded that *tempore confessionis*, &c. setting forth the day she was covert, baron, &c.; the plaintiff confessed it was so, but said that she made and sealed it on the morning of the same in which she was married, and before the marriage. Upon demurrer, the Court gave judgment for plaintiff; 2 Roll. Rep. 431.

was married when the *habeas* issued, adjudged a good plea, because the proceedings in this court are *de novo*, and the Court takes no notice of what was done in the inferior court, or of any matter *prior* to the *habeas*; but the practice in such cases is, on the return of the *habeas*, on motion to grant a *procedendo*.

inferior court, but previous to its removal by *habeas corpus* into K. B. may be pleaded in K. B.

Semb. contra in C. P.

8 HADDOCK v. HOWARD. 1746. H. T. C. P. Barnes. 355.

Defendant, whilst a *feme sole*, was arrested in the Palace Court, and after the arrest married, and then removed the plaint by *habeas corpus* into this court, and pleaded her coverture in abatement, and the Court made the rule absolute for setting aside the plea.

9. FARRER v. GRANARD. 1804. C. P. 1 N. R. 80.

To *assumpsit* for the use and occupation of certain lodgings, the defendant pleaded her coverture. Replication, that when the said promises, &c were made, the defendant's husband "lived and resided in parts beyond the seas, i. e. in that part of the kingdom called Ireland; and that, during all that time, the defendant lived in this kingdom, separate and apart from her said husband, as a single woman, and as such made the said several promises, &c." Demurrer and joinder. The plaintiff's counsel insisted that if the averment in the replication did not show, on the face of it, a permanent residence out of the kingdom, it lay on the defendant to show that it was only temporary, and that the statement that "she lived in this kingdom separate and apart from her husband," was sufficient to establish her ostensible character of a *feme sole*. But the Court did not think that a *permanent absence* sufficiently appeared from the words of the replication.—Judgment for defendant. See 2 Esp. 554. country separate and apart, &c. as a single woman, and as such, &c, promised, &c." is bad on general demurrer.

A replication to a plea of coverture, that "defendant's husband lived and resided in parts beyond the seas, i. e. in, &c. and that the defendant lived in this

10. DE GAILLON v. L'AIGLE. M. T. 1798. C. P. 1 B. & P. 357.

To *indebitatus assumpsit*, the defendant pleaded her coverture. Replication, that her husband did, when she made the alleged promises, and had since continued to reside out of the kingdom; and that the defendant traded, and the plaintiff had contracted with her as a *feme sole*, having given credit to her alone. Demurrer and joinder. *Per Cur.* The principle on which it has been decided that a *feme covert* is discharged from contracts made during marriage, is the disability she incurs by the coverture, which merges all her rights; but it has been held that under certain circumstances this disability may be suspended though the husband is actually living; and these cases are grounded on the absence of the husband, and his consequent incapacity to enjoy or perform the matrimonial rights: the first instance in point is the case of Lady Belknap, 2 Hen. 4. 7. a where a husband had been banished, and though considerable discussion arose, as to the period of continuance, the Court were of opinion that it was sufficient to establish the fact of banishment at the time the contract was entered into; this principle has been extended in the case of Sparrow v. Carruthers, cited in Lean v. Shutz, 2 Bl. 1197. where a wife was held liable for a contract made during the transportation of her husband for seven years. But we think the facts of this case still stronger than those hitherto decided; for it does not appear that the defendant's husband has ever been in this country, nor consequently had an opportunity of taking on himself those liabilities on which is grounded the law on this subject.—Judgment for plaintiff. See 1 T. R. 7; 1 Esp. 554; 1 H. Pl. 631; 5 T. R. 679; 4 Burr. 2178; Moor. 851; 2 Bl. 1195; 10 Ed. 3. 53; 1 Hen. 4. 1. a; Salk. 116. 646; S. C. Ld. Raym. 147; S. C. Comb. 402; 2 Vern. 104; 2 N. R. 38.

Though on [140] a former occasion, it was holden sufficient.*

7th. EVIDENCE.

(a) *In actions against the husband and wife jointly.*

NORWOOD v. STEVENSON AND WIFE. T. T. 1738. K. B. And. 227. S. P. Al-

* And it is conceived, since the case of Marsh v. Hutchinson, 2 B. & P. 226. abridged ante, 88. that such a replication could not be supported, unless it appeared that the husband was an alien.

LEYN v. GRAY. T. T. 1688. K.B. 2 Salk. 436. S.P. MACKELL v. GARRETT. M. T. 1698. K. B. 1 Salk. 64.

It is sufficient to prove a marriage *de facto* by evidence of cohabitation, acknowledgment, and [141] reputation, and the defendants cannot prove that they were not legally married.*

In an action for goods sold, &c, the admissions of the defendant's wife, who served in the shop, and conducted the business attached to it;

To an action by an executor upon promises made by the wife to the testator before coverture. Stevenson pleaded that he and the other defendant were never joined in lawful matrimony. On demurrer, assigning for cause that the plea should have been in abatement and not in bar, and also that the defendant had endeavoured to draw a matter cognizable in the spiritual court, within the jurisdiction of this court. It was argued by the plaintiff that the legality of the marriage ought not to be denied, it being immaterial whether the marriage be legal or not; and that this in this case a marriage *de facto* is admitted; 2 Roll. 584-5; 1 Show. 50; 2 Salk. 437; and of that opinion was the Court, who said, the plea was bad, and the reason why the legality of the marriage was not triable in personal actions, as it is in appeal and real actions, is, that a husband *de facto* is liable to his wife's debts.—Judgment for plaintiff.

(b) *In actions against husband alone.* †

1. CLIFFORD v. BURTON. E. T. 1823. C. P. MS.; S. C. 8 Moore. 16; S. C. 1 King. 199. S. P. EMERSON v. BLONDEN. E. T. 1794. N. P. 1 Esp. 142.

Declaration in *assumpsit*, for goods sold and delivered. Plea general issue. After a verdict for the plaintiff, damages 10*l.* it was now moved for a rule to show cause, why the verdict should not be set aside, on the ground, that the plaintiff's case depended entirely on the admissions and declarations of the wife of the defendant, who assisted in the shop, and conducted the business of it during his absence, and that her admission of the receipt of goods, and acknowledgment of a balance due, had been allowed to be given in evidence; as if made by her in the character of a general authorized agent of the defendant, instead of only being his agent for a particular and limited purpose, the conducting of the immediate dealings in the shop; and it was contended, that although acknowledgments or admissions, made by her on the purchase of goods

* But in an action against husband and wife, in respect of the contract of the wife, previous to the marriage, the defendant may prove under the general issue that she was, at the time of the supposed contract, the wife of another man; Cowley v. Robertson, 3 Camp. 438. abridged *ante*, 138.

† Although we have seen that the wife cannot bind the husband by any act or contract of her own, yet he may be affected by them after proof that he gave her authority (cases *supra*) to act as his agent; or by evidence, from which a previous authority by him, or his subsequent assent, can be implied; hence, as already shown, a presumption arises from *cohabitation*, that the wife has authority from the husband to purchase such articles as are necessary for herself and family; Etherington v. Parrot, Salk. 118. abridged *ante*, 44; though proof that the articles were consumed in the defendant's family is but presumptive evidence of the assent; Bull. N. P. 136. If husband and wife do not cohabit, but live apart, either by default of one without the consent of the other, or by mutual consent, or if the husband turns her out of doors, he sends her with credit for her reasonable expenses; Bull. N. P. 135. So if the husband, by ill-treatment and harsh usage, compel the wife to leave him; Hodges v. Hodges, 1 Esp. 441. abridged *ante*, 58; the same rule holds. But the ill-treatment must amount to personal violence; Horwood v. Heffer, 3 Taunt. 421. abridged *ante*, 58. So where they live apart by mutual consent, and no allowance is made by the husband, the legal obligation in the husband to provide her with necessaries continues. But if such allowance be made, we have seen, it is to be presumed, that she was trusted on her own credit, or if it be known in the town where the parties live that furnishes a reasonable presumption that the plaintiff knew, or might have ascertained, the fact; Todd v. Stokes, Ld. Raym. 444, abridged *ante*, 52. Hence, in order to support an action against the husband for articles supplied to his wife, the marriage must be proved; Norwood v. Stevenson, Andr. 237; either by direct proof, or by evidence of cohabitation and repute, or admissions by the husband. 2d. It must be proved that the goods supplied were necessaries according to the husband's situation in life; Manby v. Scott, *ante*, 44, *et seq.* To defeat the action, the defendant may prove that the wife eloped & committed adultery; Mainwaring v. Sands, 1 Stra. 706, abridged *ante*, 48. And it need not be shown that the tradesman knew of the adultery; *ibid.* But if the husband receives her back, his liability revives; Rawlyns v. Vandyke, 3 Esp. 250. So he may prove he allowed her a separate maintenance, and that the plaintiff had notice of that fact; *ibid.*; or that it was notoriously known where he resided; Todd v. Stokes, Ld. Raym. 444. Or he may show that his wife has separate funds adequate to her maintenance according to his situation in life; Liddlow v. Wilmot, 2 Stark. 86. abridged *ante*, 54.

in the shop, as part of the transaction, might be admissible, yet that they ought not to have been received when made at a different time, in a separate transaction. That in *Emerson v. Blandon*, 1 Esp. 142; and in the anonymous case in *Strange*, 527; the declarations arose out of transactions which were expressly authorized by him; but that this case was distinguished from either of those decisions, as the declarations were made after the immediate act of dealing with, the sale, and negotiating the particular business, had expired. *Per Cur.* In modern practice, if the wife be constituted the agent of the husband, to act in the shop as his representative, all she says as to such dealings must be evidence against him: and declarations, though made at a subsequent period, must be considered as the declarations of his authorized and established agent. In *White v. Cuyler*, a deed executed by the wife, though void, was admitted as evidence of a contract, binding upon the husband.—Rule refused.

2. *ANDERSON v. SANDERSON*. T. T. 1817. N. P. 2 Stark. 201.

In order to take this case out of the statute of limitations, admissions made by the defendant's wife, who acted as her husband's agent in buying and selling articles in the way of their business, were proved. On an objection to their admissibility being offered, *Richards, C. B.* said, I am of opinion that the husband has constituted his wife his agent for the management of his business, and therefore her admission as to the state of accounts are sufficient to take the case out of the statute of limitations. See 2 T. R. 265; Salk. 350; 4 T. R. 678.

3. *GREGORY v. PARKER*. M. T. 1808. N. P. 1 Campb. 395.

To an action for goods sold, defendant pleaded the statute of limitations. It appeared the goods had been furnished for the defendant's wife, and that defendant occasionally visited her. To take the case out of the statute, a letter of the wife's, promising to pay, was offered in evidence; this was objected to as not being evidence; but *Lord Ellenborough* said, the wife must be considered as agent for the husband, and the wife's acknowledgment is sufficient to take it out of the statute.—Verdict for plaintiff.

4. *FRANCE v. STEPHENS*. H. T. 1819. C. P. 8 Taunt. 693; S. C. 3 Moore. 23.

Motion for a *distringas* to compel the appearance of the defendant in this case, on an affidavit that his wife had informed the sheriff's officer that her husband was absent from home in order to avoid his creditors; that all the endeavours of the officer to find him had failed, and that a notice was left at his house. But the Court refused to receive such admission from the wife, as they might be prejudicial to her husband; and the affidavit being ineffective without these, the rule was refused.

5. *SCHOLEY v. GOODMAN*. M. T. 1823. C. P. 8 Moore. 350; S. C. 1 Bing.

Declaration in *assumpsit* upon a contract by which, after reciting the existence of differences and disputes between the defendant and his wife, it was agreed, by mutual consent that they should live separate and apart from each other; and in consideration that the defendant would pay the plaintiff 12s. a week for the use of his wife, the plaintiff undertook and promised to save harmless the defendant from all debts which she might contract, &c.

At the trial it appeared that this action was instituted by the plaintiff to recover the amount of half a year's allowance, advanced by him to the defendant's wife, pursuant to the agreement entered into upon their separation. The ground of defence set up by the defendant was, that during the time for which the demand was made, his wife was living in adultery, and to prove that fact, in addition to other evidence, a witness was produced by defendant, who stated that he heard a confession by the wife amounting to an acknowledgment of her infidelity; the admissibility of this evidence was denied by the plaintiff's counsel, but the objection was overruled by *Dallas, C. J.* and the jury found for the defendant. On a rule nisi calling on the defendant to show cause why the verdict should not be set aside, and a new trial granted on the ground that the admission and declaration of the wife could not be given in evidence in favour of her husband. *Dallas, C. J.* said, from all the cases decided, the principle is clear and uniform that a wife cannot give evidence for or against her

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As to the state of accounts between the plaintiff & her husband;

Or a letter written to her, promising payment, is admissible in evidence against the husband, even to take the case out of the statute of limitations,

But an acknowledgment by a wife that her husband has absented himself to avoid his [143] creditors, cannot be received,

So it seems that in an action by a trustee under an agreement between husband and wife to live separate, to recover the arrears of an allowance contracted to be made by the husband to her declar-

ions by the husband; but I thought if the law would recognize the agreement in question, it would create a diversity of interest between the husband and wife, and consequently break in upon the general principle. But I declined from giving any opinion, and wished the question to be brought before the Court. The plaintiff in seeking to recover on an agreement the validity of which is doubtful. Upon that subject there have been great difference in legal opinions; and I am anxious to get at the great question arising on the legality of agreements in general. Park, J. and Barrow, J. gave no opinion; but assented to the expediency of a new trial, for which the rule was made absolute. The plaintiff on seven years are admissible to rebut the presumption of his death. The plaintiff on the second trial, obtained a verdict; 8 Moor. 362.

(c) *In actions against wife alone.**

HOPEWELL v. DE PINNA. E. T. 1809. 2 Campb. 113.

In an action against defendant on a promissory note she pleaded coverture. On an objection that no evidence of the husband's being alive within seven years had been offered, letters written to his friends within seven years were produced to rebut the presumption of his death, and Lord Ellenborough, C. J. held them admissible.

8th. WITNESSES IN ACTION AGAINST.*

GAUER v. LADY LANESBOROUGH. M. T. 1791. N. P. Peake. 17.*

In this case it appeared the defendant pleaded in abatement that she was married to one Jno. King a Jew; plaintiff proved King's former marriage, and that his wife, a Jewess, was still living but defendant called King's former wife to prove a divorce by the Rabbi at Leghorn according to the custom of Jews, when plaintiff objected to her inadmissibility; but Lord Kenyon, C. J. said she was a good witness to prove that fact.

9th. JUDGMENT AND EXECUTION AGAINST.

1. CHALK v. DEACON AND WIFE. T. T. 1821. C. P. 6 Moor. 128.

A rule nisi was obtained in this case for the discharge of the defendant's wife from the custody of the sheriff, under a *capias ad satisfaciendum* on the ground of her coverture, and that the defendant was already in custody on that suit. It was stated in an affidavit of the defendant, that he being in prison in November, 1820, a *capias satisfaciendum* issued against him and the applicant, who was his lawful wife, whereon she was holden to bail, but afterwards discharged, on entering a common appearance, on a judge's order; that in Hilary term last; he being still in custody, a declaration in this cause, indorsed in bail, was delivered to the defendant; that they suffered judgment thereon to go by default, and that notice of execution of a writ of inquiry was served in the ensuing May, and that such writ was subsequently executed; that the plaintiff had not yet charged him in execution, though he was still in custody in this and other actions; but that in June last a writ of *capias ad satisfaciendum* issued against him and his wife, and that she was thereunder taken in execution and remained in gaol, and that she was destitute of the means of discharging the levy. and the affidavit concluded that oppression and vexation were the plaintiff's incitement to act as related. On the plaintiff's behalf affidavits were produced which stated that the defendant's wife was, when she married

* That her coverture may be given in evidence under the plea of *non est factum*; see Lambert v. Atkins, 2 Campb. 273, abridged, *ante*, 137; or *non assumpsit*; James v. Fowks, 12 Mod. 101 abridged *ante*, 127. To defeat this plea the plaintiff may show any fact that would establish the feme's liability to be sued as an unmarried woman; *ante*, p. 79.

* We have seen in actions by husband and wife, that they cannot be evidence for each other. And for the same reasons they cannot be evidence in actions against each other, either whether the action be against them jointly or separately.

† And if an action be brought against a *feme sole*, and pending it she marry, it seems she may be taken on a *capias ad satisfaciendum*, and the Court will not discharge her; Cro. Jac. 328, S. P. Cooper v. Hunchin, 4 East. 521, abridged *ante*, 135. So if the husband die before execution, and the action survive against the wife; she may be taken in execution, in the same manner as if the action were originally brought against her alone as a *feme sole*; 1 Rel. Abr. 890; 39, H. 6 c. 45; 46 E. 3 c. 23.

the defendant, a widow, and enjoying a considerable fortune from her former husband; and residing in his mansion; and that the plaintiff's claim arose for services as her housekeeper. The plaintiff's counsel then contended, that though it was said in Tidd. Pract. 7th edit. 1. 220. that a married woman may be discharged from execution, as well as from mesne process; it was a position unsupported by any authority, and submitted that it was even there allowed, that, by the old practice, the only grounds on which such a discharge could be granted were, that the wife was detained in prison by the collusion of the plaintiff and the husband. In support of the rule it was argued that where a feme covert is arrested in mesne process, she must be discharged on common appearance, because she has no separate property, and consequently is not compellable to put in special bail; and the counsel urged by parity of reasoning a feme covert under execution was entitled to a like discharge; and particularly in the present case, where the husband was in custody on mesne process, and capable of being charged in execution at any time; for otherwise a woman might continue in prison during life, because the husband was not charged in execution, and might not choose to satisfy the levy. The Court, after adverting to the statement of the former practice in Tidd, and observing that the present circumstances did not bring the case within the rule there stated, said, that though the book cited as to the existing practice was worthy attention, it could not be deemed an authority, as no case was adduced in support of the position, and therefore that the decision rested with the discretion of the Court; contemplating then the injury that might arise to individuals, the possibility of a feme covert possessing property independent of her husband, while he had nothing, but what alone was liable, and the peculiar nature of the plaintiff's claim, as disclosed by the affidavits, they were of opinion that they should not be justified in granting the discharge as prayed.—Rule discharged.

See Tidd. 7th edit. 1. 220; Cro. Car. 513; 1 Lev. 51; 2 Stra. 1167; *ibid.* 1237; 1 T. R. 486; 1 B. & A. 165; Sayer. 149; 9 Rep. 71; 3 Wils. 125; East. 521; 3 B. & P. 220; Man Exch. 678; S. C. 1 Tidd. 220; Bac. Abr. tit. Execution, G. 4.

2. POTTS v. MELLER. T. T. 1741. K. B. 2 Show. 1167. S. P. CHAWORTH'S CASE. M. T. 1660. K. B. 1 Lev. 51. COOPER v. OLD. E. T. C. P. Prac. Reg. 208: *id.* 208. FINCH v. DUDDIN. M. T. 1745. K. B. 2 Stra. 237.

In trover against husband and wife the Court refused to discharge the feme, who had been taken under a *capias satisfaciendum*, unless collusion between the plaintiff and the husband could be shown to keep her in prison.

ANON. H. T. 1701. K. B. 1 Salk. 117.

Per Cur. If a feme covert give a warrant of attorney, and afterwards marry, such marriage is a revocation of the authority, and judgment entered thereon is irregular.

4. WILKINS v. WETHERILL AND ANOTHER. M. T. 1802. C. P. 3 B. & P. 220. S. P. MACLEON v. DOUGLASS. E. T. 1802. C. P. 3 B. & P. 128. S. P. 1 Salk. 400.

Motion to set aside a writ of execution issued on a judgment entered up on a warrant of attorney, on the ground that the defendant who was taken under it was a married woman. It appeared that one of the defendant's being under arrest, the other, her daughter, of whose coverture the plaintiff was ignorant, joined her in the warrant of attorney in question; that judgment was thereon regularly entered up, and the daughter being taken in execution, her husband discharges the debt. The Court said, that by giving a warrant of attorney, the defendant had artfully obtained a credit, to which as a feme covert she was not entitled; they therefore refused the application, leaving her to her writ of error. See 1 B. & P. 8. n; 2 Bl. 993; 5 T. R. 194; *ibid.* 451; 3 B. & P. 128; 1 East. 16; *ibid.* 17; 1 H. Bl. 75.

5. CADOGAN v. KENNET. E. T. 1776. K. B. Cowp. 432.

* And where a married woman, who had given a warrant of attorney, married during the term, and was afterwards taken in execution on a judgment signed in that term, and therefore having relation to the first day of term; it was holden that she could not be relieved; Triggs v. Triggs. T. T. 1815. Mong. Ex. Prac. 67.

ed in trustees, under a settlement before marriage for the benefit of the wife,* and the [147] husband being in possession, if consistent with the terms of the deed, makes no alteration.

This was an action of trover by the plaintiffs, who were trustees under the marriage settlement of Lord Montfort against the defendant, Mr. Kennet, who was a judgment creditor of Lord Montfort's, and the other defendant's, who were sheriff's officer's, to recover certain goods taken by them in execution under a *feri facias*. At the trial, the plaintiff's proved Lord Montfort's marriage-settlement; by which it appeared, that the goods in question, which were the household goods belonging to Lord Montfort, at his Lordship's house in town, and which were very minutely particularized in a schedule annexed to the settlement, were all conveyed to the plaintiff's, as trustees, for the use of Lord Montfort for life, remainder to Lady Montfort for life, remainder to the first and other sons of the marriage in strict settlement. It was proved, that at the time of the settlement being made, it was known Lord Montfort was in debt; but he thought the fortune of the lady he was to marry, which amounted to 10,000*l.* was amply sufficient to pay all the debts he owed at that time, and had no idea of disappointing any creditor; that Mr. Kennet was a creditor of Lord Montfort at the time of the settlement; that Lady Montfort was a ward of the Court of Chancery; and the reason for including the household goods in the settlement was, because it was thought Lord Montfort's real estate was not of itself sufficient to make a proper and adequate settlement. It appeared, also, that the settlement was referred to a master in Chancery, who approved of the settlement; and the inserting the household goods for the reason abovementioned. The jury found a verdict for the plaintiff with nominal damages; and if the Court should be of opinion with the plaintiff's, then the goods were to be returned superficially. The question was, whether the plaintiff's, as trustees under the marriage settlement, were against the defendant, entitled to the possession of these goods for the purposes of the trust?

Per Cur. The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4. The former of these statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud. The stat. 13 Eliz. c. 6. which relates to frauds against creditors, directs, "that no act whatever done to defraud a creditor or creditors, shall be of any effect against such creditor or creditors;" but then such a construction is not to be made in support of creditors, as will make third persons sufferers; therefore the statute does not militate against any transaction bona fide, and where there is no imagination of fraud, and so is the common law; but if the transaction be not bona fide, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. There have been several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. One case was, where there had been a decree, in the Court of Chancery, and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The Court said, the purchase be-

* Hence, where previous to marriage the wife's stock in trade, furniture, &c. were assigned to a trustee, for her separate use, to enable her to carry on a separate trading, it was holden, that if the husband did not intermeddle therewith, and in the absence of fraud, such effects though fluctuating, were not liable to be taken in execution for his debts; *Jarman v. Woolton*, 5 T. R. 618. abridged *ante*, vol. iii. 702. And a settlement after marriage would, it seems, have the same effect if made in consequence of a prior agreement; 2 Eq. Cas. Abr. 148; or for a good and valuable consideration without fraud; 8 T. R. 521. It is no objection in these cases, that there is no inventory of the goods; 3 T. R. 618; 6 East 257; comprised in the settlement; or the husband being suffered to carry on the trade intended for his wife; 3 T. R. 618; provided his possession be not inconsistent with the deed; 8 T. R. 82; *Darby v. Smith*, abridged *ante*, vol. 3. 770; but a term vested in the wife before marriage, and which the husband is entitled to in her right, may be taken in execution for the husband's debt; 4 T. R. 638. Under a *feri facias* against the wife, who marries pending the action, it would be irregular to take the goods of the husband; 3 M. & S. 559.

ing with a manifest view to defeat the creditor, was fraudulent, and therefore notwithstanding a valuable consideration, void. So if a man knows of a judgment and execution, and with a view to defeat it, purchases the debtor's goods it is void, because the purpose is iniquitous; it is assisting one man to cheat another, which the law will never allow. There are many things which are considered as circumstances of fraud. The statute says not a word about possession; but the law says, if, after a sale of goods, the vendee continue in possession, and appears as the visible owner, it is evidence of fraud, because goods pass by delivery; but it is not so in the case of a lease, for that does not pass by delivery. The stat. 27 Eliz. c. 4. does not go to voluntary conveyances, merely as being voluntary, but to such as are fraudulent; a fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the action done is a bona fide transaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a trustee for the benefit of the debtor, it is fraudulent. The question then is, whether this settlement is of that sort. It is a settlement which is very common in great families. In wills of great estates, nothing is so frequent as devises of part of the personal estate to go as heir-looms; for instance, the devise of the Duke of Bridgewater's library; the old Duke of Newcastle's plate. so in marriage settlements, it is very common for libraries and plate to be thus settled, and for chattels and leases to go along with the land. If the husband grows extravagant, there never was an idea that these could afterwards be overturned; if this Court were to determine they should, the parties would resort to Chancery. We come then to the circumstances of the present case, which are very strong. There is not a suggestion of any intention to defraud or the most distant view of disappointing any creditor; the very object of the marriage settlement was, that the lady's fortune might be applied to the discharge of all Lord Montford's debts. The amount of this fortune was 10,000*l* and was thought fully sufficient for that purpose; besides this, it is a settlement approved by a master in Chancery. Most clearly the master in Chancery, and the great seal, could have no fraudulent view. But it appears, further, that the reason why the goods were inserted was, because the settlement of the real estate alone was thought inadequate without them; clearly, therefore, it was no contrivance to defeat creditors, but meant as a provision for the lady if she survived, and heir-looms for the eldest son. An argument, however, is drawn from the possession, as a strong circumstance of fraud, but it does not hold in this case. It is a part of the trust that the goods shall continue in the house, and for a very obvious reason; because the furniture of one house will not suit another, and it was the business of the trustees to see the goods were not removed. If Lord Montford had let his house with the furniture, reserving one rent for the house and another for the furniture, or if the rent could be apportioned, the creditors would be entitled to the rent. but they have no right to take the goods themselves; the possession of them belongs to the trustees, and the absolute property of them is now vested in the eldest son. Though such settlements are frequent, no case had been cited to show they are fraudulent; how common are settlements of chattels, and money in the stocks? Can there be a doubt but they are good? Yet the creditors would be entitled to the dividends during the interest of the debtor. Here there was clearly no intention to defraud, and there is a good consideration; therefore, it could not be left to the jury to find the settlement fraudulent, merely because these were creditors. The goods must be kept in the house for the benefit of the son.

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6. CROSS v. GLODE. T. T. 1796. K. B. N. P. 2 Esp. 574.

The sheriff having taken goods in execution against C. D., at the suit of A. B. The plaintiff brought trover, which disclosed these facts, that the goods in question were the separate property of C. D.'s wife, and had been conveyed by him.

Although a woman cohabits with a man, and suffers him to appear as the owner of her house in which they live, her goods can not be taken in execution in an action against him.*

to her by a proper conveyance, and that the plaintiff was duly appointed trustee under the deed. The defence was, that the trustee never took possession and that the husband seemed to be the real owner. But Lord Kenyon, C. J. held, that the preceding case was conclusive in favour of the plaintiff; and if the trustees take possession, the change of property is complete; and the husband's mere possession after that event cannot make him the ostensible owner. The plaintiff proving his possession, had a verdict.

7. EDWARDS v. BRIDGES. T. T. 1818. K. B. N. P. 2 Stark. 396.

The plaintiff had cohabited with and passed as the wife of one A. B., whom she suffered to reside in her house, and assume the character of its owner. C. D. having issued a writ of execution against him, the officers entered the house and took possession of her property. In an action by her against the sheriff, it appeared, that when the execution was first put into the premises, she said she was A. B.'s wife, but subsequently told the officer that she merely cohabited with him, and that the goods were absolutely vested in her. It was contended that A. B. must be taken to be the ostensible owner. But Abbott, J. held, that the mere circumstance of A. B. residing with the plaintiff as her husband, did not render her property liable to be seised under an execution against him.

(L) EFFECT OF BANKRUPTCY, OR INSOLVENCY, UPON THE RIGHTS AND SITUATION OF HUSBAND AND WIFE.

(a) *Of bankruptcy.*

1. The law respecting the right to obtain a commission of bankruptcy against a married woman, has been already stated under tit. Bankrupt, vol. iii. p. 437. and in the note appended thereto; from which it may be recollected that a *feme covert* could only be made bankrupt in those cases, in which, according to the principle of *Marshall v. Rutton*, abridged ante, p. 78. she might be sued, and taken in execution for her debts; viz. where the husband has become an exile, been transported for life, or a sole trader according to the custom of London: and that, if merely separated by articles, she cannot become bankrupt; *Whitmarsh. B. L. 5.* In what cases the husband and wife must join in petitioning for a commission, ante, vol. iii. p. 548. 549. n; and under what circumstances the commissioners may summon, examine, and commit the wife, has been likewise shown, ante, vol. iii. p. 605. as well as the right of a creditor whose debt has accrued due from the wife before the coverture, to prove under the husband's commission, ante, vol. iii. p. 631. and the effect of the assignment to the assignees upon the property of the wife in the possession of the husband, vol. iii. p. 757. It therefore only remains to notice some points respecting the wife's *choses* in action, and what is technically denominated her equity.

As the assignment passes to the assignees the same rights as the husband possessed, her *choses* in action necessarily pass to them, who may reduce such securities into possession, subject to the same equity of making a provision for the wife as the bankrupt would have been liable to if he had sued for them.

Respecting the wife's right by survivorship to *choses* in action not reduced by the assignment into possession, much doubt, previous to the case of *Mitford v. Mitford*, 9 Ves. 87, existed; it was however there holden, that the assignment has not the effect of reducing into possession a *chose* in action of the wife, whose right by survivorship ought to be allowed against the assignees; see also *Hornsby v. Lee*, 2 Mad. Rep. 16.

Where the husband or his assignees can come at the wife's property at law, a court of equity will not interfere with the legal title; and till a bill filed, a trustee, who has the wife's property, may pay the rents and profits, and hand over the personal estate to the husband; but after bill filed it is otherwise; 1 P. Wms. 382. n; 4 Ves. 15; 10 Ves. 90. But where the husband, or his as-

* So where a tradesman supplied a married woman living apart from her husband, with furniture upon hire, it was holden that he did not thereby divest himself of the right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract, and therefore, where the sheriff took such goods in execution at the suit of the husband's creditor, the Court held that trover might be maintained by the tradesman; *Smith v. Plomer*, 15 East, 607. abridged ante, p. 75.

signess, come into a court of equity for the recovery of the wife's property, the Court will impose terms upon them, by stipulating, as a consideration for lending its assistance, that a provision should be made for her out of the fund; 1 Atk. 192; id. 280. And it is equally settled, that this equity will be administered at her own suit by her next friend, when the subject of the suit is of equitable, and not of legal, cognizance; 5 Ves. 737. This equity is personal to the wife, and the Court acknowledges no original title in the children, who can claim only that provision which the wife thinks fit to secure to herself; 2 Eden. 337; 1 Mad. Rep. 453; and she may, at any time before the execution of the settlement by consent in court, waive the settlement, and defeat the children; 10 Ves. 88. 91. But if she does not waive it, it will, upon her death, enure for the benefit of the children; and it has been decided, that an actual settlement is not necessary to give title to the children; and if there is a decree in a cause, referring it to the master to approve of a proper settlement for the wife and children, (2 Dick. 604; 10 Ves. 89.) and the wife die before any proceedings under the decree, the settlement must still be made for the children. And in a recent case before the Vice Chancellor, this doctrine was carried one step further, where it was decided, that the equity attaches at the filing of the bill, which gives the Court jurisdiction as to the property, whether the bill is filed by the wife or others, and the children were held entitled to the benefit of the equity attaching upon a bill filed by an executor; though the wife died before answer; 1 G. & J. 64.

In ordinary cases, upon a reference to the master to approve of a proper settlement, regard must be had on the one hand to any prior settlement of the property made by the husband in right of his wife; 1 S. & S. 250. The sum in question has frequently been equally divided between the wife and the assignees. 1 Mad. Rep. 371; 1 G. & J. 40. Put it seems, that in no case will the whole be given; 11 Ves. 20; 1 Mad. Rep. 362; Green v. Otte, 1 S. & S. 250.

(b) *Of insolvency.*

Ex parte DEACON. E. T. 1822. K. B. 5 B. & A. 759.

The Insolvent Act, 1 Geo. 4. c. 119. enacts, that when an order is made for the discharge of a prisoner, the Court may order that a judgment shall be entered up against such prisoner in some one of the superior courts, in the name of the assignee or assignees of such prisoner, and that such prisoner shall execute a warrant of attorney to authorise the entering up of such judgment, and such judgment shall have the force of a recognizance. Under these provisions it was contended, in support of an application for a *mandamus* to the commissioners of the Court of Insolvent Debtors, that a feme covert, who had filed her petition and schedule in due time, and had offered to conform to the other directions of the statute, was entitled to be discharged, and that no weight ought to be given to the reason assigned by the Court for refusing to allow her to take the benefit of the act; that she could not execute a warrant of attorney, as it was the daily practice to discharge minors. *Sed per Cur.* There is no analogy between the rights and disabilities of a person under age and a married woman; the acts of the former are only voidable, the latter absolutely void. The commissioners have acted correctly in refusing to extend the benefits of the act to a feme covert. An application might have been made to the court in which the action was brought, for her discharge out of custody. Rule refused. See tit. Infant; Insolvent Debtor.

(M) CRIMINAL PROSECUTION CONNECTED WITH HUSBAND AND WIFE.

(a) *When the wife is or is not exonerated from crime by coercion of her husband.*

1. REX v. SQUIRE AND HIS WIFE. Stafford Lent Assizes. 1799. Cited 1 Russell on Crimes, 24.

G. S. and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner, G. S. and it appeared in evidence, that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that, in his

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A married woman who has no property to assign, and who cannot execute the warrant of attorney to confess judgment, and comply with the other conditions of the insolvent act, is not entitled to be discharged under it. *Sed vide* 7 Geo. 4. c. 57. s. 72. Where the wife must be considered as acting merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal,

though she
be privy to
his mis-
conduct.

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And with
regard to
inferior mis-
demean-
ours, hus-
band and
wife may
be indicted
together,
and she
may be
punished
with him;
as for keep-
ing a bawdy
house;

Or a gam-
ing house.

And the
indictment
in such
case may
be against
husband
and wife,
*et uterque
eorum.*

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And she
may be in-
dicted al-
one as a
common
scold;

judgment, the boy died from debility, and want of proper food and nourishment, and not from the wounds, &c. which he had received. Upon which *Larence*, J. directed the jury, that as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully witholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in *foro conscientie* the wife was equally guilty with her husband, yet, in point of law, she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.

2. THE QUEEN v. WILLIAMS. M.T. 1711. K.B. 10 Mod. 63. S.C. 1 Salk. 384.

Husband and wife were indicted for keeping a house of ill fame. It was moved in arrest of judgment, that the husband and wife could not be jointly indicted, and *Brook's case*, 2 Roll. 8. was cited. But it was answered, it was not only for keeping a bawdy-house, but for procuring lewdness, &c.; that these crimes are in their nature several; that husband and wife may be found guilty of nuisance, battery, or the like; that the reason why in burglary, larceny, &c. the wife is excused, is because she cannot tell what property the husband may claim in goods, &c.; and that in Hilary term, in the second year of Queen Anne, James Cook and his wife were jointly indicted for keeping a bawdy-house, and the husband fined, and the wife set in the pillory.

Per Cur. The indictment is good. Keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband.

3. THE KING v. DIXON AND HIS WIFE. T. T. 1715. K. B. 10 Mod. 335.

This was an indictment against D and his wife, charging that they, *et uterque eorum*, did unjustly and unlawfully, on, &c. and divers other days, &c. keep a common gaming house, contrary to the form of the statute, &c., to which the defendants demurred; and in support of the demurrer it was contended, 1st, that the indictment should not have been brought against the husband alone. But on this objection being overruled, on the authority of *The Queen v. Williams*, *supra*, it was contended, 2dly, that it was charged in the indictment that they, *et uterque eorum*, kept a gaming house, &c., which was wrong, for two persons cannot jointly and severally keep a house. The keeping of the house by the husband and wife is not a keeping the house by the husband only, or by the wife only. For this purpose was quoted 2 Rolles. 51; in which an indictment against four persons for using the trade of a plumber, against the form of the statute 5 Eliz. c. 4. s. 31. alleging that the four, *et uterque eorum*, used the trade, was held naught, because the user of the one could not be the user of the other.

Per Cur. The case in Rolles is not applicable to the present case; for there the using of the trade not being the offence, but using the trade without having served an apprenticeship (an act to be performed by each singly and severally,) being an offence that was, in its own nature impossible to be committed jointly; whereas here this may be committed by both jointly; and the addition of *uterque eorum* is but further specifying and corroborating the former charge; for whoever says that both of them did keep, &c., does in truth and consequence say that each of them did so.

4. THE QUEEN v. FOXBY. T. T. 1703. K. B. 6 Mod. 213. 239; S. C. 1 Salk. 206; S. C. Holt. 274.

This was an indictment against the defendant, a married woman, as a com-

* And the rule is general, that a *feme covert* shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company which the law construes as equivalent to coercion; 1 Hale. 45; 1 Hawk. P. C. c. 1. s. 9. This compulsion, however, being only a presumption of law, it follows, that if upon the evidence it distinctly appears that the wife was not incited or compelled to commit the offence by her husband, but she was the principal instigator of it, she is guilty as well as her husband; hence, if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by the

mon scold; no objection was taken to her not being solely liable in consequence of her coverture.

5. *THE KING v. FENNER*. E. T. 1666. K. B. Sid. 410. *Semb.* S. P. *THE KING v. JORDAN*. E. T. 1669. K. B. 2 Keb. 634.

This was an indictment against a *feme covert*, without her husband, for engrossing fish. After she was found guilty, it was moved, that the indictment might be quashed, as she ought not to have been proceeded against without her husband, as the contract for the commodity bought was necessarily made either with him, or in contemplation of law for him; but the objection was overruled. Or for fore
stalling;

6. *REX v. INGRAM ET UX.* H. T. 1710. K. B. 1 Salk. 384.

Indictment against husband and wife for assault and battery; a technical objection was taken to the form of the indictment, but no point was raised as to the wife not being amenable. Or for an
assault and
battery;*

7. *THE KING v. JOHN AND MARY HAMMOND*. 1787. 1 Leach. C. L. 444; S. C. 2 East. P. C. 1119.

A man and his wife being indicted on stat. 9 Geo. 1 c. 22. and 27 Geo. 2. c. 15. it appeared that the wife had written the letter, and that the husband, pretending to have found it, delivered it to the prosecutor. There being no evidence to show that the husband had any knowledge of the contents of the letter, the Court directed the jury to acquit the husband, for he should have been indicted under stat. 30. Geo. 2. c. 24. making it a misdemeanour knowingly to deliver a threatening letter; and as to the wife, they said, that if the jury were of opinion that she wrote the letter herself, without any interference of her husband, and sent it by him without his knowing any thing of the contents, she alone might be found guilty; but otherwise, both must be acquitted; and, under this direction, the jury found them both not guilty. Or for send
ing threat
ing letters†
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8. *REX v. HARRISON*. 1756. 1 Leach. C. L. 47; S. C. 2 East. P. C. 559.

The prisoner was an apprentice to the prosecutor, and it appeared that the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and that she had pawned some of the articles of it in order to supply the prisoner with pocket money, but the articles she pawned were not those which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken. The Court held, that the prosecutor's wife having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her privity or consent, it might be presumed that he had received it from her. Prisoner acquitted. A stranger,
however,
cannot be
found gui
ty of larc
eny, if it ap
pear that he
obtained
possession
of the
goods, by
delivering
of them to
him by the
owner's
wife ‡

(b) *When she may be accessory to a crime committed by her husband.*

A *feme covert*, by procuring her husband to commit an offence, becomes amenable as an accessory before the fact, in the same manner as if she had coercion of, her husband, she is punishable as much as if she was sole; Hawk. P. C. c. 1. s. 11. And she will be guilty in the same manner of all such crimes which, like murder, are *male in se*, and are prohibited by the law of nature; 4 Bl. Com. 29; and in all cases where the wife offends *alone* without being in the company and under the coercion of her husband, she is responsible for her offence as much as a *feme sole*; 4 Bl. Com. 29; and if a wife offend against a penal statute, the husband may be made a party to an action or information, and shall be liable to answer what shall be recovered therein; 1 Hawk. P. C. c. 1. s. 13.

* Or forcible entry; 1 Hale 21; Co. Lit. 357; 1 Hawk. c. 64. s. 35; or for keeping a bawdy-house, if her husband do not live with her; 1 Hawk. P. C. c. 1. s. 13. n. 11.

† Or she may be committed for disobeying an order of bastardy; *Rex v. Taylor*, 3 Burr. 1679. abridged post.

‡ For a *feme covert* cannot be guilty of felony in stealing the property of her husband, or can any person be found so to whom the goods were delivered by her; 1 Hale. 514; but trespass, it seems, would lie against such receiver; *ibid.*; and it is upon this principle of identity that a prosecution for a conspiracy is not maintainable against husband and wife, they being only one person, and possessing only one will; 1 Hawk. P. C. c. 72. s. 8;

been unmarried; 1 Hale 516; 3 Hawk. P. C. c. 29. s. 34; but she cannot be treated as an accessory for having received her husband with a knowledge of his having been guilty of felony; 1 Hale, 47; nor if she conceal a felon jointly with her husband; id. 1 Hawk. P. C. c. 1. s. 10.

(c) *Degree of guilt incurred by wife killing her husband, or vice versa.*

The 25 Ed. 3. s. 5. c. 2. makes it petit treason for the wife to murder her husband. A wife, though divorced *a mensa et thoro*, is within the statute, because the *vinculum matrimonii* subsists; but otherwise if there be a divorce *causa conjugum*, for tho the *vinculum* is dissolved; 1 Hale. 380; 1 Hawk. P. C. c. 32. s. 9; 4 Elac. Com. 203. Feigning a wife *de facto* is not sufficient; and therefore if A be married to B., and during that intermarriage marry C. the second marriage being void, A. is not a wife within this rule, though perhaps she might, under circumstances, be considered as a servant, if she cohabit with C., and he finds her necessaries for her subsistence; 1 Hale. 380; but the learned writer adds *tamen quere*. But a husband cannot be guilty of petit treason by killing his wife; for there is no reciprocity of obedience and subjection; 1 Hawk. P. C. c. 32. s. 9. To establish the offence of petit treason, two witnesses are necessary; 1 Ed. 6. c. 12. s. 22.

(d) *When she may be arrested, &c. for offences, and proceedings incident thereto.*

A married woman who has committed any offence which subjects her to criminal prosecution, may be apprehended; Rex v. Taylor, 3 Burr. 1680; and the warrant or summons may be issued against her alone; id. When she is bailed, the recognizance can be taken only from the sureties; see *ante*, vol. iii. p. 349; Petersdorff on Bail, 510.

(e) *When a feme covert is a prosecutrix, how recognizance is to be taken.*

Under the statute 1 & 2 Ph. & M. c. 13. s. 5., and 2 Ph. & M. c. 10. s. 2. which empowers magistrates to bind over witness to give evidence, a *feme covert* cannot be a party to the recognizance, but it is compulsory upon her to find others to be bound for her.

(f) *Evidence.*

1. MARY GRIGG'S CASE. M. T. 1659. K. B. T. Raym. 1.

The defendant was indicted under the stat. 1. Jac. 1. c. 12. for bigamy. The first husband being called as a witness to prove the marriage, the Court unanimously refused to admit his testimony, and said that a wife could not be admitted to give evidence against her husband, nor the husband against the wife, in any case except in prosecutions for high treason. See 1 Br. and Gold. 47; Co. Lit. 66; 1 Hale. 301.

2. Rex v. AZIR. T. T. 1724. K. B. 1 Stra. 633. S. P. ANON. E. T. 2708. K. P. 11 Mod. Rep. 224.

On an indictment against the husband for an assault upon the wife, the Chief Justice allowed her to be a good witness for the king. S. P. Ful. N. P. 286; 1 Hale. 301; 1 St. Tr. 393; Hutt. 116; 1 Phil. Ev. 70. 3d edit.

3. Rex v. LOCKER, WAINWRIGHT, AND WIFE. H. T. 1804. 5 Esp. 107.

The defendants were indicted for a conspiracy; the defendants defended separately, and appeared by different attorneys. Wainwright's counsel proposed calling Locker's wife, on the ground that although the wife could not be a witness for her husband, yet that the defendant Wainwright might make use of her testimony; but Lord Ellenborough refused to receive the evidence, on the ground that, if all the other defendants were acquitted, the husband must of necessity be acquitted; and she would then in effect be giving evidence for

* Or on an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved, for the second marriage is void; see *post*, tit. Polygamy.

† Or for assisting another in committing a rape upon his own wife; Rex v. Lord Audley, 1 H. T. 393; or upon an indictment for forcible abduction and marriage; see *ante*, vol. i. p. 86; or upon an indictment against the husband for the murder of his wife; the dying declarations of the wife are receivable in evidence against him; Rex v. Woodcock, 1 Leach. C. L. 500; S. P. Douglas's case, 2 id. 561. abridged *post*, tit. Dying Declarations.

The rule that husband and wife cannot be witnesses for or against each other, applies to criminal as well as civil proceedings. Except in the case of high treason.

Or where the husband is indicted for a personal injury to the wife.*

But consistently with the general rule upon an indictment for conspiracy,

her husband, which was contrary to one of the first principles of the law of evidence.

called on behalf of a co-defendant, though the parties appear and defend separately;*

4. *REX v. FREDERICK AND TRACY*. T. T. 1737. K. B. 2 Stra. 1095.

The defendants were indicted for a joint assault; at the trial it was insisted that the wife of Tracy might be examined for the other defendant; but material evidence having been adduced against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants in the account to be given of the transaction, the Chief Justice refused to let her be examined.

5. *REX v. THE INHABITANTS OF CLIVIGER*. H. T. 1738. K. B. 2 T. R. 263.

On an appeal against an order of removal of a pauper, and also of a woman as his wife, the respondent having proved the marriage, the appellants called the pauper for the purpose of proving his former marriage with another woman, but he swore directly the reverse; they then called the woman to prove the alleged former marriage. The justices at the sessions rejected the witness, and this Court determined that she was not competent to give such evidence. *Aslin* and *Grose*, Justices, (the only judges in court) being of opinion that a husband and wife could not be permitted, from a principle of public policy, to give any evidence that might even tend to criminate each other; that the objection is not confined merely to cases where they are directly accused of a crime, but even in collateral cases, if their evidence tends that way, it shall not be admitted; for although the evidence of one cannot be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. See 2 Lord Raym. 752; Ca. Temp. Hard. 264.

6. *THE KING v. THE INHABITANTS OF ALL SAINTS, WORCESTER*. E. T. 1817.

K. B. 1 Phil. Ev. 63. 3d edit.

The respondents removed a pauper to the place of her maiden settlement, and produced Ann Willis to prove her own marriage with G. Willis; the appellant's objected on the ground that they intended to prove the subsequent marriage of G. Willis with the pauper. The sessions received the evidence of Ann Willis, who proved the marriage; the respondents then proved the maiden settlement of the pauper, in the appellant parish, and her marriage with G. Willis subsequently to the first marriage; the appellant's then objected that the testimony of Ann Willis ought to be struck out. The Court of King's Bench held that the evidence was unobjectionable when received, and could not subsequently be expunged: that the evidence was admissible, since it did not directly criminate the husband, and could not afterwards be used against him, or made the ground-work of any future prosecution. The Court further intimated, contrary to the case of *King v. Cliviger*, that the former wife would have been competent to prove the marriage, even although the subsequent marriage had been previously proved.

7. *BROUGHTON v HARPUR*. H. T. 1701. K. B. 2 Lord Raym. 752.

The plaintiff made title to lands as son and heir of A. B. and C. D. his wife in right of C. D.; and the defendant's case was, that A. B. was married to a former wife then living. *Gould*, J. admitted the woman to whom A. B. was supposed to be married, to prove the former marriage; but afterwards as the reports state, the same cause being heard upon the same title, between the same parties, *Holt*, C. J. after debate, refused to admit the former wife, as a witness to prove the former fact.

* And in such a case, the wife of one of the conspirators should not be allowed to give evidence against any of the others, as to any act done by him in furtherance of the common design, particularly after evidence given connecting the husband with the defendant in the general scheme: Arch. Crim. Pl. 97. 1st edit. In Lord Hale's P. C. 301. the rule is thus stated; "a woman is not bound to be sworn, or to give evidence against another, in case of theft, &c. if her husband be concerned, though it be material against another and not directly against her husband."

the wife of one defendant cannot be Or on an indictment for an assault, when the cases of the co-defendants cannot be separated.

And it has been held, that the husband or wife cannot be admitted to give evidence which tends to the crimination of the other, even in a collateral case.

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But this rule seems too general, and cannot now be sustained to its full extent.

At least in no case can a woman be compelled to give any evidence charging the husband with an offence.

Barretry, See Tit. Insurance.
Barretry,

- (A) WHAT CONSTITUTES THE OFFENCE, p. 157.
- (B) INDICTMENT FOR, p. 158.
- (C) INFORMATION FOR, p. 159.
- (D) TRIAL, VERDICT AND JUDGMENT, p. 159.
- (E) PUNISHMENT FOR, p. 160.

(A) WHAT CONSTITUTES THE OFFENCE.

REX v. — H. T. 1685. K. B. 3 Mod. 97.

An attempt not to reco- [158]
 ver a man's own right, but to ruin and oppress another, is barretry.^{*}
 On an indictment for barretry, the evidence was that one G. was arrested at the suit of C. for 4000*l.* and brought before a judge to give bail, and that the defendant, a barrister at law then present, did solicit this suit, when in truth at the same time C. was indebted to G. in 200*l.* and that he did not owe the said C. one farthing.

Herbert, C. J. was first of opinion that this might be a maintenance, but that this was not barretry unless it appeared that the defendant did know that C. had no cause of action after it was brought. If a man should be arrested for a trifling, or for no cause, this is no barretry, though it is a sign of a very ill Christian, it being against the express word of God; but a man may arrest another, thinking he hath a just cause so to do, when as in truth, he hath none; for he may be mistaken, especially where there hath been great dealings between the parties. But if the design was not to recover his own right, but only to ruin and oppress his neighbour, that is barretry. Now it appearing upon the evidence that the defendant entertained C. in his house, and brought several actions in his name where nothing was due, that he was therefore guilty of that crime. See 2 Lord Raym. 1248; 3 Pac. Ab. 524; 8 Mod. 230; 12 Mod. 516; Cro. Jac. 527; Dyer 249; 2 Inst. 215.

(B) INDICTMENT FOR.

1. **REX v. HARDWICKE.** E. T. 1665. K. B. 1 Sid. 282.

The indictment for barretry should charge the defendant with being a common barrator.[†]
 H. was indicted at the sessions, and judgment was there given against him, that he was a promoter of suits, and a common oppressor of his neighbours, and was fined 200*l.* The judges all agreed that the indictment was not good without the word barrator, and the great reason was because all the precedents are so, and therefore the judgment was reversed; but they said that the finding him to be a common oppressor of his neighbours, was good evidence to find him guilty of barretry, and consequently they bound H. to his good behaviour, and ruled that the county might indict him again with the words Barrator. See 6 Mod. 311; Forms. 2 Chif. C. L. 232.

* A barrator is defined to be a common quarreller in his own cause; 8 Cro. 86. b., or an exciter or maintainer of quarrels or suits; Co. Lit. 368. a; whether in Courts of record or before inferior tribunals, *ibid.* If a party maliciously purchase a *supplicavit* for the peace to enforce a composition; 8 Co. 37. b; or if he invent or promulgate false rumours, whereby discord arises; Co. Lit. 368. b; 8 Co. 36. b. he is guilty of the offence. But if he spends money in the lawful suits of another, he is not a barrator; 1 Roll. 355. even if the action prove ultimately groundless; 3 Mod 97.

† Or an attorney. 1 Rol. 355; And formerly a feme covert could not be a barratress; 2 Rol. Rep. 39; though this opinion seems now questionable; Hawk. p. c. p. 248.

‡ From this it would seem to follow, that a person cannot be a barrator, in respect of one act, for that would not make him a common barrator. It is not essential to alledge in an indictment for this offence any particular place where it was committed; for, from the nature of the crime, which consists in the repetition of several acts, it must be supposed to have happened in several places, and therefore it is holden that the trial must be from the body of the county; Cro. Jac. 527; Cro. Eliz. 195; 1 Hawk. P. C. 244; 2 Hawk. P. C. c. 28. s. 61. This being an offence at common law, (though the stat. 3 Edw. 3. c. 1. directs the mode of punishing it) if the indictment conclude against the form of the statute, it is good; and such words may be rejected as surplusage; Cro. Eliz. 148; 1 Saund. 135. But the indictment must conclude against the peace, otherwise it is insufficient; Cro. Jac. 527. In *Barnes v. Constantine*. Yelv. 46. it was adjudged, that justices of peace, as each, have, by virtue of the commission of peace, authority to inquire and hear this offence, without any special commission of oyer and terminer; and therefore in an action for procuring the plaintiff to be indicted as a common barrator before A. B. and C. D., justices of the peace, and also assigned to hear and determine divers felonies, &c. and that he

2. *IVERSON v MOORE*. T. T. 1699. K. B. 1 Lord Raym. 490.

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Per Gould, J. In indictment for barrettry the indictment is general, because it consists of multiplicity of facts; but the Court in justice will compel the prosecutor to assign some particular instances; and if he proves them, he shall be admitted to prove as many more of them as he pleases to aggravate the fine. And assign some particular instances.

(C) INFORMATION FOR.

In an information for barrettry, it was said that the defendant stood upon his protection, but *Per Cur.* There is no protection in case of breach of the peace, nor against a rule of K. B. Freem. Rep. 359.

(D) TRIAL, VERDICT, AND JUDGMENT.

1. *REX v. URLYN*. E. T. 1670, K. B. 2 Saund. 308.

J. U. was indicted at the assizes of common barrettry, which being removed into this court by *certiorari*, he appeared, and pleaded not guilty, and of this he puts himself upon the country and Thomas Fanshaw, knt. coroner and attorney of our Lord the king, in the court before the king himself likewise, and the verdict found that the said J. U. is guilty of the premises in the indictment specified and laid to his charge in manner and form as the said T. F. within complains against him. It was moved in arrest of judgment that the verdict was insufficient; because the defendant is not found guilty generally, but only that he is guilty *modo et forma prout præd' T. F. versue eum queritur*. Whereas in fact the said T. F. had not complained against the defendant, for this was not an information exhibited in this court by the said Sir T. F. but an indictment in the country; and the said Sir T. F. did only join issue for the king; which, if the indictment had remained in the country, the clerk of the assizes ought to have done. and this fault was not aided by any statute of jeofails, because this case was excepted out of all the statute of jeofails, and thereupon *cur' adcurare voluit*. But afterwards the Court over-ruled the exception, and adjudged the verdict sufficient, because the words *modo et forma, &c.* was mere surplussage; for the defendant is found guilty *de premissis in indict' infra specificato interius ec imposit'* which is a complete verdict of itself; without saying more, and the subsequent words are merely a void surplussage, wherefore judgment was given against the defendant. But because it seemed to the Court to be a malicious prosecution, which had been for a long time, viz. seven years, a small fine was set on the defendant. A verdict in the K. B. entered against defendant upon an indictment for barrettry, removed by *certiorari* from the assizes, in these terms, guilty in manner and form as the said A. B. complains of him, was holden sufficient.

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And a judgment for the offence need not say how long the defendant should be bound for his good behaviour.

2. *REX v. RAYNER*. T. T. 1664. K. B. Sid. 214.

Error assigned to reverse a judgment in an indictment for barrettry, because it is that he shall be fined 100*l.* and be of the good behaviour, without saying how long, and so uncertain; but the record was that he should be fined. *Et ulterius ordinatum est*, that he shall be of the good behaviour; and therefore the Court held that the good behaviour as it is here entered, is no part of the judgment, but they seemed to doubt if it had been entered in apt words whether such uncertainty would not have hurt the judgment.

3. *REX v. NURSE*. M. T. 1607. K. B. Sid. 148.

One N. was indicted for barrettry, and found guilty, and had his judgment. was acquitted; upon oyer of the record, it appeared to have been *before justices of the peace only*, whereupon the defendant's demurred for the variance. But it was holden that there was no variance, because justices have an authority to hear and inquire the offence of barrettry, without any special commission of oyer and terminer; 2 Bl. Rep. 1050.

* Though it is now established that an indictment for barratry in a general form, stating the defendant to be a common barrator, without showing any particular facts, is good; 2 Hawk. P. C. 6 fol. edit. And in *Rex v. Clayton*, 2 Keb. 409, an exception to an action of barratry was taken, because it is only said, *ad sessionem pacis tent' coram justiciariis prole West Riding in Yorkshire, tent' per adjournamentum*, and does not say it was actually adjourned, nor before what justices. *Sed non allocatur*, for the first justices goes to all, and it was said *ad commune documentum diversorum*, and does not say *omnium*, as in case of a highway. *Sed non allocatur*, for it is sufficient, as in case of indictment for a common scold.

And if it say justices of oyer and terminer, instead of gaol delivery, it will be bad.

† An indictment for barratry at the sessions of the peace may be tried on the same day as the indictment is found; Jenk. 817. pl. 9.

Judgment on indictment for barratry was reversed on error, and held on motion that no writ of restitution lies for a stranger to the record; and Holt, C. J. If it did, it must be by *scire facias*; 1 Show. 261.

If an attorney, solicitor, or agent, who has been found guilty of barratry, shall practice as such, they shall be transported for seven years.†

Afteawards he brought a writ of error and assigned, among other things, that it was tried by the justices of oyer and terminer at the next assizes, which could not be, but it ought to be before justices of gaol delivery. And the Court were of opinion that judgment should be reversed for these errors.

(E) PUNISHMENT FOR.*

By the 12 Geo. 1. c. 29. s. 4. made perpetual by 21 Geo. 2. c. 8. it is enacted, that if any person convicted of common barratry shall practice as an attorney, solicitor, or agent. in any suit or action in England, the Court in which it shall be brought, shall upon complaint or information examine the matter in a summary way, in an open court; and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years.

Barrister.†

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If the inns of court refuse to call a student, he must appeal to the 12 judges, since a *mandamus* will not lie to compel his admission.

See tits. Arbitration and Award, Motion, Arrest, Prisoner, Attorney, Trial. Inquiry, Writ of,

1. REX V. GRAY'S INN. E. T. 1780. K. B. 1 Doug. 353.

An application was made for a *mandamus* to be directed to the benchers of Gray's Inn to compel them to call the prosecutor to the degree of a barrister at law. On a rule to show cause, it appeared that the bencher had rejected him on the ground that he had been discharged under an insolvent debtor's act. It also appeared that he had complied with all the usual requisites, such as paying the dues, and performing exercises; and the two societies of the Inner and Middle Temple had been of opinion that the ground of rejection was not sufficient, though Lincoln's Inn was of opinion that it was a valid ground of rejection. *Per Cur.* The original institution of the inns of court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the crown. They are voluntary societies, which for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar is delegated to them from the judges, and, in every instance, their conduct is subject to their control as visitors (see Dugdale's *Origines Juridiciales*.) From the first traces of their existence to this day, no example can be found of an interposition by the courts of Westminster Hall proceeding according to the general law of the land; but the judges have acted as in a domestic forum.—The only case in which an attempt was made to proceed in this court is reported in March. One Booreman, a barrister of one of the Temples, having been expelled, he applied for his writ of restitution, but it was denied, "because there is none in the inn of court to whom the writ can be directed, for it is no body corporate, but only a voluntary society, and submitting to government; and the ancient and usual way of redress, for any grievance in the inns of court, was by appealing to the judges." In Townsend's case, reported by Sir Thomas Raymond, it is assumed, *arguendo*, that no *mandamus* will lie to the inns of court. The first reason stated in March is not the true one. The se-

* The punishment for this offence in common persons is by fine and imprisonment, and binding them to good behaviour; see 34 Edw. 3. c. 1. 1 Hawk. P. C. c. 81, s. 14; 1 Bac. Ab. 509; 4 Blac. Com. 134.

† And before that statute, an attorney, upon barratry being proved against him, was ordered to be struck off the roll, and fined 50l.

‡ Barristers are counsellors learned in the law, and admitted to plead at the bar, to protect the interests of those litigant parties with the management of whose suits they may be entrusted. They are termed *juris consulti*, and were anciently designated *apprentices of the law* (in Latin *apprenticii juris nobiliores*), from the French *apprendre*, to learn. To qualify a student to be called to the bar, he must have been a member of one of the inns of court, viz. Inner Temple, Middle Temple, Lincoln's Inn, or Gray's Inn, for five years, unless he has taken the degree of M. A. or B. L. in either of the Universities of Oxford, Cambridge. or Dublin, in which case three years will be sufficient; during which period he must keep 12 terms commons in the hall of the society to which he belongs. Students intended for the Irish bar, besides keeping nine terms in the King's Inn in Dublin, are required to keep eight terms in one of the law societies in London. See the different Guides to the Inns of Court.

tend is the true reason. The true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the judges. There has been a very late instance where this method of appeal had the sanction of all the judges. "The first day of Hilary term, an appeal of one Maurice Savage against an order of the benchers of Lincoln's Inn, which rescinded an order for his call to the bar, made about four or five days before, on the ground of misrepresentation or surprise, was heard by all the judges in Serjeant's Inn Hall. The judges, being attended by the treasurers of the two societies of Lincoln's Inn and the Middle Temple, and examining the under-treasurers of each (not upon oath, for they proceeded as visitors), and the circumstances of the charge fully appearing, and after hearing Savage in support of his appeal, who did not examine any one to vary the facts declared their opinion that the call to the bar appearing to have been obtained by surprise, and the bench of Lincoln's Inn having proceeded immediately to annul it, the appeal should be dismissed." The consequence of all this is, that we are all of opinion that no rule should be made for a *mandamus*; but, if there is a ground for it, the party must take the ancient course of applying to the twelve judges.*

2. ANON. E. T. 1704 K. B. 6 Mod. Rep. 137.

In this case, it appeared the defendant was formerly an attorney, but was now called to the bar, and accused of foul practice. *Per Cur.* Although he is now a counsel, yet perhaps that will not discharge him from being an attorney still, and then we can get his demands taxed as such. See 2 Hawk. P. C. c. 22. s. 30; 3 Burr. 1256.

3. MORRIS V. HUNT. T. T. 1819. K. B. 1 Chit. Rep. 551. S. P. CHORLEY V. BOLCOT. T. T. 1791. K. B. 4 T. R. 317.

Per Bayley, J. It is said that counsel can maintain no action for their fees. Why? Because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honour and integrity of the bar that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect.

4. FELL V. BROWN. M. T. 1792. N. P. Peake. 96.

In an action against defendant, a barrister, for unskillfully settling a bill, by which plaintiff was obliged to pay the costs occasioned by such negligence.

Lord Kenyon, C. J. said. The action most certainly could not be supported; this was, he believed, the first action of the kind, and he sincerely hoped it would be the last.—Plaintiff nonsuited.

5. TURNER V. PHILIPPS. E. T. 1792. N. P. Peake. 123.

The defendant, a barrister, had received a brief from plaintiff, but did not attend the trial. This action was brought to recover back the fee; but Lord Kenyon said, that the fees of barristers and physicians were not considered as sums paid for their labour, but as a present made by the client, and therefore the plaintiff could not recover. See *Chorley v. Boliot*, 4 T. R. 317; *Fell v. Browne*, Peake. N. P. 96.

6. HODGSON V. SCARLETT, ESQ. H. T. 1818. K. B. 1 B. & A. 232; S. C. Holt. N. P. C. 621.

This was an action for slander. The plaintiff was an attorney, and the defendant a gentleman at the bar. The words stated in the declaration were as

* And upon this ground the Court have refused a *mandamus* to the Society of Lincoln's Inn, to compel the benchers to admit a party as a student of the inn; *ex parte Wooler*, M. T. K. B. 1825.

† But a certificated conveyancer may maintain an action to recover a compensation for business done; *Poucher v. Norman*, 8 B. & C. 744; 8. C. 5 D. R. 648; *sed vide contra Jenkins v. Shide*, 1 Carr. 270.

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Qu. whether an attorney after being called to the bar remains liable as an attorney.

A barrister cannot maintain an action for his fees.†

And therefore he is not liable for negligence.

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Nor to refund a fee given to him to argue a cause to which he did not attend,

Nor is he liable for words spoken by him as counsel,

if they be
pertinent
to the mat-
ter in issue,

follows. "Some actions are founded in folly; some in knavery; some in both; some in the folly of the attorney; some in the knavery of the attorney; some in the folly and the knavery of the parties themselves. Mr. Peter Hodgson was the attorney of the parties; drew the promissory note; fraudulently got C. D. to pay into his hands 150*l.* for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." Plea, general issue. It appeared that the plaintiff had been engaged as attorney in a transaction which was the subject of a suit at the assizes, in which Mr. Scarlett, as counsel for the defendant, spoke the above words. It was admitted at the trial that the words spoken were relative to the subject matter of the cause. The judge before whom the cause was tried thereupon held that, as the words were relevant, the jury were not to try whether on the former occasion they were well or ill founded, as that would be in fact trying the cause over again; and thinking that there was nothing to leave to them, even supposing the words to be proved, nonsuited the plaintiff. A rule nisi had been obtained for a new trial, on the ground that it ought to have been left to the jury to say whether the words were pertinent to the matter in issue or not. Upon the rule now coming before the Court, cause was shown against it, when the counsel observed, that the words used by Mr. Scarlett had been, according to the judge's report, admitted by the other side to have been used as observations in a cause, and to have been pertinent to the matter in issue; but Lord Ellenborough said, that as the counsel for the plaintiff did not seem to have apprehended the fact to be so, it might be as well to state the circumstances of the case, whereupon they appeared to be as follows. Action for money had and received; plaintiff, defendant, and A. B. were part owners of a ship. The ship was sold to pay the debts due upon her, and then the surplus to be divided among the owners. She was transferred to C. D. who gave a promissory note payable by instalments, for the price for which she was sold to the defendant and A. B. These two persons were appointed, by agreement amongst the parties, managers of the concern, to whom a deposit of 30*l.* 10*s.* was paid by C. D. Hodgson (the plaintiff in the cause now before the Court) was the attorney for all parties, and cognizant of all the above transactions, drew the bill of sale, the promissory note, &c. Subsequently another sum was paid in liquidation of the ship's price by C. D. to Hodgson for the plaintiff; and afterwards C. D. paid another sum to the defendant; to recover the alleged proportion of which last sum the action was brought. A question was made at the trial, on the cross-examination of C. D. whether the money paid to Hodgson had not been paid by C. D. in consequence of a letter from Hodgson threatening an action, which letter was exhibited. C. D. denied knowing any thing of that transaction. A nonsuit was entered, the judge conceiving that the plaintiff had received more than his share of the proceeds of the vessel. Upon the disclosure of these facts, his lordship observed, "If that be the state of the facts, in that case the words appear to have been very relevant." The Court afterwards delivered the following judgment in the present action. Counsel are entitled to use the information communicated to them by their clients, in a fair and *bona fide* exposition of the merits of the case submitted to their care. They are privileged in commenting on the case, and in making observations upon the instruments or agents by whom the case is brought into court. This privilege belongs to them, and may be exercised with a large and liberal freedom. In this point of view it was necessary to consider the situation of the person who is the subject of the observations which form the ground of this action. Now the plaintiff in this case was not merely the attorney, but was mixed up in the concoction of the antecedent facts, out of which the original cause arose. He was aware of all the circumstances, and must have known, as a professional man, that there was no ground for the action. It was in commenting on this conduct that the words were used by the learned counsel. He had a right so to comment; for he could not comment upon all the circumstances of the case in their proper light without adverting to Hodgson as the instrument which put the action in

motion, and as the manufacturer of all the information upon which the action was founded. As Hodgson was the agent in the transaction, what was the effect of that circumstance? Why, it stripped the plaintiff in that case of all right to maintain his action. It is therefore clear that the defendant's observations were strictly pertinent to the matter then under discussion, and were authorised according to the rule laid down in *Brooke v. Sir Henry Montague*, (Cro. Jac. 90.) "that a counsellor in law retained hath a privilege to enforce any thing which is informed unto him for his client, it being *pertinent* to the matter in question, and not to examine whether it be true or false." Besides, if reference be had to various authorities establishing the privilege of speech in the parties themselves whom the counsel represent, for we consider the privilege in the one case of the same extent as in the other, it will be found that a much greater latitude is permitted than it is necessary for our present purpose to avail ourselves of. This exception may, however, exist, that a party, from his comparative ignorance of what is or is not relevant, may not be restricted within the same limits as a counsel, whose superior knowledge of itself should be sufficient to restrain him within due bounds. But, strictly speaking, they stand upon the same foundation. In 1st *Hawkins*, P. C. c. 73. s. 8. it is laid down that "no false or scandalous matter, contained in a petition to a committee of parliament or in articles of the peace exhibited to justices; or in any other proceedings in a regular course of justice, will make the complaint amount to a libel." And in *Roll's Abridgment*, (pl. 817; *Sir W. Jones*. 431; *March*. 20. pl. 45.) a case is stated in which it was holden, in arrest of judgment, that an action was not maintainable where the words were spoken by the party in defence of himself, and in a legal and judicial way, by which is to be understood that they were spoken in a court of justice, and there too the words were charged, and were found, by the verdict for the plaintiff to have been spoken falsely and maliciously, which makes it a very strong case. It may be perhaps allowed that the expressions used were of a harsh nature. But still a counsel might *bona fide* think such an expression as *that Hodgson was a fraudulent and wicked attorney*, justifiable under the circumstances. It may not be prudent or correct generally to mix the attorney with his client; but here Hodgson induced a party to bring an action from which he could derive no benefit. And though *fraudulent and wicked* may be stronger terms than others would have used, yet, as applied to the promissory note, are they not relevant? and if relevant, are they not within the protection of the law? The pertinency of the expressions to the matter in issue being therefore manifest, and in the second place, so far as the circumstances of the case went, it not appearing that the learned counsel attacked the plaintiff *at random*, or that he went of his way for the purpose of slandering his character, so as to give a pretence for saying that the defendant *maliciously* availed himself of his situation to utter the expressions he did (for if express malice be shown, we do not say that an action could not be maintained); we must discharge the rule, as no advantage could be derived from sending this case to a new trial, as the result must and ought to be the same.* See *Styles*. 462; 1 T. R. 110. 544-5; *Bull. N. P.* 8; 2 *Burr.* 807; 4 *id.* 24. 25; 3 *B. & P.* 587; *Com. Dig.* Action on the Case for Defamation, f. 13; 1 *Saund.* 130; 4 *Rep.* 146; *Dyer.* 285. a.

* "After the judgment of the Court in this case, it may seem almost unnecessary to add any thing else, in illustration of the right claimed by counsel, and hitherto always exercised, to speak, with the most unrestrained freedom, upon all subjects connected with the case before them; confining themselves only (if upon statement), to matters pertinent to the subject on trial; or, if in the expression of feeling, to such terms as are natural and proper to the occasion. The right is so simple, and indeed so manifest, that a sufficient reason for it is almost included in the above description of what it is. The counsel for a party is the legal substitute for that party himself. As respects the subject before the Court, such counsel is presumed to be invested with the whole person and case of his client. Whatever, therefore, law or reason would allow to a man pleading his own cause, whether in statement, or in the expression of natural feeling, belongs, in the same extent, to the counsel who represents him. Without such latitude, a counsel would be a very imperfect and inadequate representative of his client. The principle therefore belongs to natural justice as well as to law. It is a part of the necessary means to enable counsel to make as full

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Nor can he be called to prove that a motion was made by him, or arose, whether the barrister was a competent witness to prove that he made its purport. Nor is he liable to serve the office of constable.

And the acts of the senior counsel at the trial are conclusive.*

But a bare retainer does not authorise him to withdraw the record at Nisi Prius.

A barrister is entitled to have the venue laid in Middlesex.

But if he lay it in

[167] Middlesex, the Court will not suffer him to change it.

And if he be sued jointly with others, the privilege of

7. CURRY V. WALTER. H. T. 1795. C. P. N. P. 1 Esp. 457.

A barrister having made an application to the K. B. for an information against the plaintiff for improper conduct in his office of justice of the peace, and the defendant having published an account thereof in a newspaper; the plaintiff brought an action against the defendant for a libel; when a question arose, whether the barrister was a competent witness to prove that he made the motion, and the contents of the application.

Per Gibbs C. J. A counsellor as such is incompetent, unless he volunteer to give evidence. It must be proved by other testimony.

8. POORDAGE'S CASE. M. T. 1666. K. B. 1 Mod. 22; S. C. 2 Keb. 578; S. C. 1 Sid. 431.

On a writ of privilege being brought, the Court said, that barristers at law were privileged from serving the office of constable, because of their attendance in Court.

9 WINTER V. MAIR. E. T. 1811. C. P. 5 Taunt. 531.

A junior counsel at the trial of this cause having made an objection which his senior deemed of no avail. On motion for a new trial, that objection among others was mentioned in the Court. But the Court said, that they could not entertain any objection which had been abandoned by the leading counsel.

10. AHITBOL V. BONEDETTO. M. T. 1810. C. P. 3 Taunt. 225.

On this cause coming on, the plaintiff's attorney not appearing, his counsel said that they were retained and that they should withdraw the record as they were entitled to do, which was opposed on the ground that a mere retainer did not authorise them to interfere with the interests of the cause. And of that opinion was *Lawrence, J.* who nonsuited the plaintiff.

11. SEAMEN V. LING. M. T. 1694. K. B. 2 Salk. 668.

It was holden in this case that if the defendant be a barrister, he is entitled to have the venue changed to Middlesex. But see 4 Burr. 2057; 3 T. R. 573; 1 Blac. 19; 2 id. 1065; Wils. 159. 1 Vent. 1. 11. 16. 29. 268; 1 Mod. 64; 2 Show. 176. 242.

12. WINGFIELD'S CASE. T. T. 1670. K. B. 1 Mod. Rep. 64.

On motion to change the venue in an action of *indebitatus assumpsit*, brought by the plaintiff a barrister

Per Twisden, J. We cannot grant this motion, because his attendance in this court is necessary. See 2 Salk. 668. 70. 822; 2 Show. 176. 242; 2 Vent. 47; 6 Mod. 123; 1 Lord Raym. 342. 99. 533; 2 id. 1556.

13. TOWNSEND V. THE ASSIGNEES AND SEVERAL COMMISSIONERS OF BANKRUPTCY. M. T. K. B. 8 Mod. Rep. 316

On motion to change the venue from W. to London or Middlesex, as one of the defendant's was a barrister, and the others attorneys, it was urged that it was the constant rule of the Court to allow parties to change it in all transitory actions, and especially in this case, because all the assignees and commissioners are made defendants, and the only evidence that can be brought against them is, what they have done as commissioners here. It was allowed and sufficient a defence as could be made by the party himself. Nor, on the other hand, is there any injury in the extravagance natural to a counsel or his client under these circumstances. It goes forth only as an *ex parte* statement. It is given as such, and received as such, and the due allowance is always made. Whatever excess there may be in it is amended by the same liberty allowed to the opposite counsel in answer and defence, or by the correction of the judge upon his observations on the evidence and the whole case. In the result, therefore, any restriction to the liberty of speech at the bar would be more injurious to the interests of public justice, than any latitude in the exercise of it (always subject to the control of the Court) could possibly be to individual feeling and character."—*Holt, N. P. C.* 626. a. From *Flint and Pike*, 4 B. & C. 273. it seems, that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.

* And if a counsel give consent, the Court will act upon it, and the client will be bound; 1 J. & W. 472.

for the plaintiff that the commission and the proceeding's under it were good^{changing} but contended that the privilege of a barrister or attorney was never carried^{the venue} further than when they were concerned in an action in their own right; and^{to Middle} that where another is concerned with them, the privilege is never allowed.^{sex, does} not attach.

Per Cur. We cannot change the venue, because the plaintiff obliged himself to give evidence only of such matters as happened in W.; and when another is joined in a suit with a barrister, or in *autre droit*, he loses his privilege. A barrister may al-
lege. Motion refused.

14. *ASTREY'S CASE*. H. T. 1704 K. B. 2 Salk. 651; S. C. 6 Mod. 123. ways have

Per Cur. A trial at bar is never denied to officers of the Court, or barristers; Bar. a trial at
for by the stat. of Westminster 2. c. 3. is *terminetur* that they may be determined there, *quae magna indigeant examinatione* See Sid. 407; 2 Keb. 133.
164. 1 Inst. 424.

15. *SMITH V. WHEELER*. H. T. 1669. 70. K. B. 1 Mod. Rep. 38. A king's

In this case a sergeant being about to argue was stopped by the Court, counsel cannot ar-
which observed, that as he was a king's sergeant, he could not plead against gue against
the crown. the crown.*

Barter. See tit. *Exchange*

Bast Per. See tit. *Fee simple*.

Bastard.† As to the Settlement and Removal of Unmarried Women [168]
with Child, see tit. Poor, Settlement of; Conspiracy; Slander.

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* Without special license, which is obtained by petitioning his Majesty, a request which is never refused, but an expence of about 9l. must be incurred in obtaining it; 3 Bla. Com. 28; see form of petition. See post, Appendix, and hands. Prac. 417.

† This term, according to Sir Henry Spelman, is derived from the pure Saxon word *bastard*.

BASTARD.—*Who is or is not esteemed such.*

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I. WHO IS OR IS NOT ESTEEMED SUCH.

- (A) WHERE NO MARRIAGE EXISTS BEFORE THE CHILD IS BORN.

During the feudal system, bastardy was esteemed, in England and Germany, a signal mark of ignominy; and afforded a ground for excluding the party labouring under the disgrace of illegitimacy from admission to a feudal service. But in Spain, Italy, and France, bastards were, in many respects, on an equality with legitimate children. See *Œuvres de Chancelier d'Aguesseau*, t. vii. p. 381. Dissertation dans laquelle on discute les principes du droit Romain et du droit François par rapport aux bastards. But, according to Sir Henry Spelman (though he does not refer to any authority), bastardy, among the northern nations, was no bar to succession; and to show that it was not considered by them as ignominious, he cites the letter of William the Conqueror to Allan Count of Britany, beginning with these words: “*Ego Willielmus Rex cognomento Bastardus.*”

A bastard, by the law of England, is the offspring of parents between whom no legal marriage exists *before* the child is born. The civil and common law do not allow a child to remain illegitimate if the parents subsequently intermarry; and in this particular these codes differ most materially from our municipal regulations, which, though not so strict as to require that the child shall be conceived, yet make it an indispensable condition to make it legitimate that it shall be *born, after* lawful wedlock; see *Watk. Gilb. Ten.* 20; 2 *Inst.* 79. 96; *Barrington on the stat. Merton.* c. 9; 1 *Reeve. Hist.* 111. 265. But the rule of the civilians and canonists still prevails in Scotland; they consider the subsequent marriage as having been entered into when the child was begotten; hence even there the rule is confined to the case of such woman whom the father, at that period, might have married; *Ersk. Princ.* b. 1. c. 7. s. 37.

- (B) WHERE A MARRIAGE EXISTS, AND THE HUSBAND IS ALIVE, WHEN THE CHILD IS BORN.

(a) *In what cases access is presumed,* and under what circumstances allowed to be rebutted.*

1. *BANBURY PEERAGE CASE.* 13 May, 1811. D. P. extracted from printed report of the proceedings. *S. P. KING v. LUFFE.* H. T. 1807. K. B. 8 East. 193. *HEAD v. HEAD.* H. T. 1823. 1 S. & S. 150.

The following questions were put to the judges, and answered by their lordships:

1st. “Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always, by the law of England, *prima facie* evidence that such a child is legitimate; and whether in every case, in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question. Whether such *prima facie* evidence of legiti-

* A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father; per Sir John Leach, V. C. in *Head v. Head*, 1 S. & S. 151.

macy may always, or may not always, be lawfully rebutted by satisfactory evidence* that such access did not take place between the husband and wife as by the laws of nature is necessary in order for the man to be, in fact, the father of the child; whether, though the physical fact of impotency, or of non-access, or of non-generating access (as the case may be), may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved?"

The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges upon this question, as follows:

"That the fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence that such child is legitimate.

"That in every one, in which there is *prima facie* evidence of any right existing in any person, *onus probandi* is always upon the person or party calling this right in question.

"That such *prima facie* evidence of legitimacy, may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary in order for the man to be, in fact, the father of the child.

"That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary, by the law of England, that a physical fact be proved."

2d. "Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife; by which, according to the laws of nature; he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?"

3d; "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact."

In answer to the said questions the Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges on the same as follows:

"That after proof given of such cases of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them,) no evidence can be received except it tend to falsify the proof that such intercourse had taken place."

* This must be understood to mean such evidence as would be satisfactory, having regard to the special circumstances of the case. It is to be deduced as a corollary, from the opinion of the learned judge in the Banbury case, that whenever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of an after born child, if sexual intercourse did then take place between them, such sexual intercourse was *prima facie* to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present case the husband and wife are proved to have been together at a time when, if sexual intercourse did take place between them, the husband might, in the order of nature, have been the father of the plaintiff; and the circumstances given in evidence, on the part of the defendant, not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probability in favour of the fact that sexual intercourse did take place between them. It is true, that the rule laid down by the learned judge who tried the issue, from the case of the King v. Luffe, (8 East. 193.) cannot be reconciled with the opinion of all the judges in the Banbury case, and is not therefore to be considered as the rule now applicable to the subject; yet, as it is my opinion that if, upon any direction from that learned judge, the jury had found a different verdict, it would have been my duty to have ordered a new trial; it cannot serve either the purposes of justice, or the interest of the parties, to submit this case a second time to a jury, in order to give to the defendant the chance of their coming to a verdict which, if they did find it, I could not adopt. *Per* Leach, V. C. in *Head v. Head*, 1 S. & S. 152.

The birth of a child by a married woman is *prima facie* evidence of legitimacy.

But such *prima facie* evidence may be rebutted.

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Though after proof of sexual intercourse between married parents, no evidence can be received except to falsify the proof of intercourse.

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact."

4th. "Whether in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place after the marriage between the husband and wife, (the husband not being proved to be separated from her by sentence of divorce,) until the contrary is proved by evidence sufficient to establish the fact of such non-access to negative such presumption of sexual intercourse within the period when, according to the laws of nature, he might be the father of such child?"

5th. "Whether the legitimacy of a child born in lawful wedlock, the husband not being proved to be separated from his wife by sentence of divorce, can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can legally be left to a jury upon any trial in courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

Then the judges being agreed in their opinion, in answer to the said questions propounded to them, the Lord Chief Justice of the Court of Common Pleas delivered their unanimous opinion upon the same, as follows:

"That in every case where a child is born in lawful wedlock, the husband not being separated from his lawful wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such sexual intercourse, the husband could, according to the laws of nature, be the father of such child.

"That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. When the legitimacy of a child, in such a case, is disputed on the ground that the husband is not the father of such child, the question to be left to the jury is, whether the husband was the father of such child; and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child.

"The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand those expressions, as applied to the present question, as meaning the same thing, because, in one sense of the word 'access,' the husband may be said to have access to his wife, as being in the same place, or the same house; and yet, under such circumstances as, instead of proving, tend to disprove, that any sexual intercourse took place between them."

2. THE CASE OF THE PARISHES OF ST. GEORGE AND ST. MARGARET, WESTMINSTER. M. T. 1715. K. B. 1 Salk. 123.

Per Cur. If baron and feme, without sentence, part, and live separate, the children shall be taken to be legitimate, and so till the contrary be proved; for access shall be intended; but if it be found that the man had no access, the child is a bastard. See 1 Bl. Com. 457; post, p. 176.

3. REX v. BROWNE. T. T. 1728. K. B. 2 Stra. 811.

Upon an order of bastardy, it was stated that the husband had been absent six years, and that during his absence the defendant had had carnal knowledge of the wife, and therefore they adjudged him to be the putative father.

Sed per Cur. That order must be quashed, for his lying with her is not a

If there be a separation by consent, the presumption of law will still be in favour of access and of legitimacy, till the contrary be proved.

Even if the woman be

sufficient reason to infer him the father of this child; and though the justices need not show the grounds they go upon, yet if they do, and it appears not sufficient ground, their order will be bad. unfaithful to her husband.

(b) In what cases the presumption of access is negatived.

1, When the husband is beyond four seas.

1. *REX v. ALBERTON*. M. T. 1690. K. B. 1 *Ld. Raym* 395; S. C. 1 *Salk* 483. pl. 38; *Carth.* 469; *Holt*. 507, S. P. *THE QUEEN v. MURREY* M. T. 1703. K. B. 1 *Salk*. 122.

On the removal of an order of bastardy, it appeared that a feme covert, during the absence of her husband at Cadiz, was delivered of a child, and that her husband was not in England from the time of her conception till the period of the birth. The question was, whether the child was a bastard within the 18 Eliz. c. 3. s. 2. the words of the act being, children begotten and born out of lawful matrimony, which it was contended, could not apply to this case, the parents being married at the time of the parturition. *Sed per Cur.* All persons are bastards who are begotten and born of a feme covert whilst her husband is beyond the four seas.* See 4 *Vin. Abr.* p. 216. B. 3, 4, 5 & 6. The conception and birth of a child while husband is [174] extra quatuor maria, conclusively negatives the presumption of access.

2. *REX v. THE INHABITANTS OF MAIDSTONE*. T. T. 1810. K. B. 12 *East*. 550.

A. B. volunteered into a regiment, in consequence of which he embarked for Sicily in April, 1806, where he remained till he returned to England on the 4th of January, 1808. C. D., his wife, who remained in England during all the above period, was delivered of a child on the 5th of May, 1808. The Court all agreed that such child must be taken to be a bastard. Hence a birth of a woman nearly two years after the departure of her husband to a foreign country must be considered a bastard.

2. When direct evidence of non-access is adduced.

1. *THE PARISH OF ST. ANDREW v. THE PARISH OF ST. BRIDE*. E. T. 1716. K. B. 1 *Stra*. 51. S. P. *THE KING v. THE INHABITANTS OF BEDALL*. T. T. 1736. K. B. 2 *Stra*. 1076. *REX v. MAIDSTONE*. T. T. 1810. K. B. 12 *East*. 550.

An order of sessions for the removal of three children from St. A. to St. B. set forth, that A., about 23 years prior to the order, married B., and lived five years with her in St. B. At the end of five years he left her and married another woman, and never afterwards saw his first wife, B., who after a long time having heard nothing of A., married a second husband, by whom she had eight children in St. A., who assumed the name of her second husband, five of whom were dead, and three survived. The sessions, presuming that the second marriage was void; held that the settlement of the three children was in St. B. where the first husband lived, thus deeming the children the legitimate issue of the first marriage. *Per Cur.* The order must be quashed, because, it being distinctly proved that the first husband had no access to her for 17 years, there can be no doubt but they are the children of the second marriage; and not being born in St. B., nor having lived 40 days there, can have no settlement in St. B. Wherever there is a manifest physical impossibility that the husband can have procreated the child, it shall be deemed a bastard, from whatever cause such may arise.

2. *PENDRELL v. PENDRELL*. H. T. 1731. K. B. 2 *Stra*. 925.

This was an issue out of Chancery, to try whether the plaintiff was heir-at-law of T. P. It was agreed that plaintiff's father and mother were married, and lived together some months, when they separated, his father going into S. and she staying in L.; three years afterwards plaintiff was born; and there being some doubt upon the evidence whether the husband had not been in L. within the last year, the plaintiff rested on the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. The Court agreed, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider the point of access, and they found a verdict for defendant. The Court allowed the defendant to prove the mother a woman of ill fame, but would not allow her declarations as evidence till she had been called, and denied them on the cross-examination.

See 1 *Salk*. 120; *And.* 9; *Wils.* 340.

* In the subsequent part of the judgment, the Court held that the husband must have been absent not only at the time of the conception and birth, but during the entire period of gestation. This doctrine is now completely exploded; see *Rex v. Luffe*, 8 *East*, 210. [175] Thus if it can be proved by clear evidence that the husband has not had access during the entire period of gestation, the child is a bastard.

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3. REX v. LUFFE. H. T. 1807. K. B. 8 East. 193.

From an order of bastardy filiating the child of a married woman, it appeared that the child had been born after access of the husband, but that the birth of the child had been on the 13th of July, 1806: that the fact of non-access stood proved from the 9th of April, 1804, until the 29th of June, 1806; and that the access of the husband had not been until within a fortnight before the birth. After the order had been, under these circumstances, confirmed by the quarter sessions, it was returned by *certiorari* into this court, when it was objected, that it had not been proved that the husband had had no access during the whole time of the pregnancy. Lord Ellenborough, after quoting many authorities, and commenting upon them, observed; from all these authorities I think this conclusion may be drawn, that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded; and therefore, if we may resort at all to such impediments, arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to show the actual physical impossibility of the husband's being the father, I will not say the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed. No person can, however, raise a question, whether a fortnight's access of the husband, before the birth of a fullgrown child, can constitute, in the course of nature, the actual relation of father and child. But it is said, that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so; for the general presumption that the child is legitimate will prevail, except a case of plain natural impossibility is shown; and to establish, as an exception, a case of such extreme impossibility as the present, cannot do any harm, or produce any uncertainty in the law on this subject. We must therefore confirm the order.

Neither is
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parties have
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dead,) to
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See 1 Salk. 122; 5 Mod. 319; S. C. 1 Ld. Raym. 395; Salk. 484; Carth. 469; 1 Str. 45; 2 id. 925; 4 T. R. 251. 356; Co. Litt. 254. a; 4 Vin. Abr. 21. letter B. pl. 3. 4. 5. & 6; 1 Bl. Com. 457; E. 10, Ed. 1. B. Rot. 23; 1 Rol. Abr. 359. (see the case commented upon, 3 East. 200. in notes;) 1 H. 6, 3. b; Bracton, p. 6. a.

4. TOMPSON v. SAUL. T. T. 1791. K. B. 4 T. R. 356.

Long after the death of all the parties, it was proved that the husband left Norwich, and went to reside in London; that his wife remained behind, and lived with another man and his wife for years, during which time the child in question was born; that this child always went by the adulterer's name, and was reputed illegitimate in the family; was held sufficient evidence of illegitimacy, though it did not clearly appear where the real husband had been from the time of conception to that of delivery.

3. When the parents are divorced.

ST. GEORGE, SOUTHWARK, v. ST. MARGARET'S. WESTMINSTER. M. T. 1705.

K. B. 11 Mod. Rep. 106; S. C. Sett. & Rem. 154; S. C. 1 Sald. 123.

Where
there is a
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occasion for
reputing the
children illegitimate; 1 Woodd. 394. Though in the case of
adultery, a clause is sometimes inserted for illegitimizing children born after a particular
time; see Martin's Divorce Bill, 1798.

Three children were born in St. G. parish, belonging to M. B., the wife of G. B., an inhabitant of St. M. The inhabitants of St. M. contended that M. B. was a lewd woman, and had the children long after she was divorced by a sentence in the Ecclesiastical Court; but the justices sent them, by an order of sessions, to St. M., on being informed that the husband lived there, conten-

* But we have seen, that if they are separated by *consent*, a different rule prevails, *ante*, p. 173. And in case of divorce in a spiritual court, a *vinculo matrimonii*, all the issue born during the coverture are bastards, because such divorce is always upon some cause, in or cause that rendered the marriage unlawful and null from the beginning. But where parliament dissolves a marriage for a cause subsequent thereto, there is no necessary or general occasion for reputing the children illegitimate; 1 Woodd. 394. Though in the case of adultery, a clause is sometimes inserted for illegitimizing children born after a particular time; see Martin's Divorce Bill, 1798.

ding that to be the place of their last legal settlement. On motion to quash this order, it was contended they were bastards, in which the Court concurred, as they were begotten after M. B. was divorced. On which it was objected, that it did not appear by the order but that the husband got them.

Per Holt, C. J. We will intend the contrary, unless you can prove their cohabitation. See 1 Bl. Com. 457; Bul. N. P. 112; 4 Vin Abr. p. 221.

4. Where there is a physical inability.

DOE, DEM. OF LOMAX, v. HOLMDEY AND OTHERS. M. T. 1732. K. B. 2 Stra. 940; S. C. Bul. N. P. 113.

In ejectment, the question on a trial at bar was, whether the lessor was the son of C. L. deceased, which depended on the question of his mother's marriage, which was proved, and evidence given of the husband's living frequently at L. where the mother lived, so that access must be presumed. The defendants were allowed to give evidence of his inability from a bad state of body, though their evidence could not prove an impossibility, but an improbability only; the Court thought that not sufficient, and gave a verdict for plaintiff.*

Evidence of the husband's inability from physical infirmity is admissible†

(C) WHERE THE HUSBAND DIES BEFORE THE CHILD IS BORN.

As to posthumous offspring the general rule is, that if the child be born within the usual period of gestation, i. e. 40 weeks, it is to be deemed legitimate; if beyond, a bastard; Rodwell's case, Co. Litt. 124. b. Put this is necessarily a fact to be tried by a jury; for, as it has been quaintly observed that the law does not appoint any certain time for the birth of a child, and that it is sufficient for the purpose of legitimacy if it be born within a few days after the 40 weeks, if it can be proved, by circumstances, to be the issue of the husband; 1 Rol. Abr. 356. And Dr. Hunter, in a communication to the learned Editor of the First Institutes, stated, 1. The usual period of gestation is nine calendar months; but there is, very commonly, a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, at six months it cannot be. 3. I have known a woman bear a living child, in a perfectly natural way, 14 days later than nine calendar months, and believe two women to have been delivered of a child alive, in a natural way, above 10 calendar months from the hour of conception. See also Rol. Abr. 356; Lord Ellenborough's judgment in Rex v. Luffe, 8 East. 207.

II. WHO IS OR IS NOT COMPETENT TO PROVE THE CHILD SUCH; AND OF THE ADMISSIBILITY OF GENERAL EVIDENCE.

1. PARISH OF ST. PETER'S IN WORCESTER. E. T. 1731. K. B. Bul. N. P. 112; N. P. Burr S. C. 25. MAY v. MAY. H. T. 1743. Bul. N. P. 112.

On an appeal against an order of removal, where the sessions stated that J. H., the father of the pauper, swore that he had travelled with H. A. for seven years, and during all that time they cohabited as man and wife; that she had the pauper, and two other children by him, born in Swinsford Parish; and that they were reputed man and wife, and continued so till the woman's death, but that they never were married; the Court held, that as all this case was dis-

astr.

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† This decision accords with a rule established at a very early period, that issue during wedlock may be bastardized by proof of a natural impossibility that the husband could have been the father; hence, where the husband was an infirm bedridden man, a child born within 12 weeks after the marriage was holden to be a bastard; Foxcroft's case, 1 Rol. Abr. 359. So where the husband was shown to be within the age of puberty; id. 358; for instance, under 14 years; Y. B.; 1 Hen. 6. 36. But evidence that a husband was divorced from his first wife for impotence; see tit. divorce; does not prove the bastardy of a child during the second marriage; Com. Dig. Bastard, B; 5 Co. 986; 2 Lev. 169. 173; Dy. 179. n. Foras is said, a man may be *habilis et inhabilis diversis temporibus*, and this is applicable whether the divorce was *causa impotentia quod hunc* or *propter perpetuum impotentiam*; 1 Aud. 105; 2 Lev. 169.

* And in Rex v. Luffe, 8 East. 207. Lord Ellenborough said, there must be a physical impossibility of the husband being the father; for upon the ground of improbability, however strong, I should not venture to proceed.

closed on the sole evidence of the father, however difficult it might be to admit his evidence to bastardize a reputed legitimate child, yet as all depended on the father's testimony, the whole must be taken together; then it appeared that he never was married; and consequently the child, being a bastard, was settled at Swinford. And the Court said there was no colour to say the father was swearing to discharge himself; for if the child were legitimate, he was bound to keep it, by 43 Eliz.; and if a bastard, he must indemnify the parish, by 18 Eliz.

2. THE KING v. THE INHABITANTS OF BROMLEY. T. T. 1795. K. B. 4 T. R. 330. S. P. THE KING v. THE INHABITANTS OF READING. M. T. 1734. Ca. Temp. Hard. 79; And. 10; 2 Sess. Ca. 286. pl. 175. LORD VALENTIA'S CASE. D. P. Cowp. 593. SACHEVERELL'S CASE. Bul. N. P. 241.

Of mother is competent to prove the bastardy of a child for want of a legal marriage.

The appellants, against an order of removal, offered to produce the wife of the alleged reputed father to prove that she never was married, or that if she ever was, the ceremony took place in Ireland, under such circumstances as (the appellants contended), by the laws of Ireland, rendered it wholly void. The respondent's counsel submitted that the evidence offered by the appellant's was inadmissible. *Sed per Cur.* It has been decided that the parents may be called as witnesses, with respect to the legitimacy of their issue and if they may be called to prove that they are legitimate children, there is no reason why they should not be considered as competent when called to prove that they are illegitimate children.

3. STANDEN v. STANDEN. H. T. 1791. Peake. N. P. C. 32. S. P. REX v. BRAMLEY, *supra*.

And a husband *de facto* may prove the marriage informal, and bastardize the issue;

This was an issue to try whether the plaintiff was the lawful issue of C. S. The plaintiff called his mother, who proved that she was married to C. S. the father, on, &c., that they cohabited together, and that the plaintiff was born in that wedlock. In answer to a question whether any banns were published,* she said she had no other knowledge of the fact than having been told so by C. S.; C. S. himself was afterward examined, and swore that the banns were not duly published three times. On this evidence being objected to, Lord Kenyon held that the father's admissions that the ceremony had taken place, and subsequent cohabitation ensued, went only to his credit; but plaintiff had a verdict notwithstanding his evidence. See Standen v. Edwards, 1 Ves. Jun. 133.

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4. GOODRIGHT, D. STEVENS v. Moss. E. T. 1679. K. B. Cowp. 591.

Whether the child was born subsequent or prior to a marriage.

In ejectment, the question turned on the legitimacy of the plaintiff. He gave in evidence the marriage of his parents, Nov. 2, 1703, and the register of his birth, as follows: "Christenings, 1704. S., the son of F. and M. S. baptised July 3d." To repel this, the defendant offered general declarations of the father and mother (who were dead) that he was born before marriage; and, 2dly, the declaration of the mother in her answer in Chancery, to a bill filed by the committee of the person last seised, which were rejected at the trial. On motion for a new trial, the Court held, 1st, that the father and mother, if alive, could have been examined to the point; 2dly, that their declaration to that effect could have been given in evidence after their deaths, and consequently, an answer in Chancery might be so given, as being evidence under the parent's hand of having made such a declaration.

5. STAPLETON v. STAPLETON. T. T. 1736. K. B. Ca. Temp. Hard. 277. S. P. THE KING v. READING. M. T. 1734. *id.* LOMAX v. HOLMDEN. M. T. 1732. K. B. 2 Stra. 940. S. C. Pul. N. P. 287. *nom.* LOMAX v. LOMAX. SARAH BRODIE'S CASE. N. P. 1774. *cited id.*

And the parents are competent to prove the legitimacy of their children.

This was an issue directed out of Chancery, to try whether the father of the plaintiff was the legitimate son of P. S.; and it was admitted by the defendant that the plaintiff was P.'s eldest son, by M. G.; but his defence was, that the father was not then married to her, but was so afterwards, as he proved by

* See *post*, tit. Marriage, that it is not necessary for the party who wishes to establish the marriage to prove the publication of banns.

the register, after which the defendant was born; so that he was the eldest lawful son. The plaintiff had only presumptive evidence of a marriage being had between them before his birth; and defendant produced his mother, the father's wife, to be an evidence to the plaintiff, if he liked it. And, And the wife is competent to prove the access of the husband. But her declarations are not admissible, except for the purpose of contradicting her. [180]

Per Lord Hardwicke, C. J. She may be a good witness to prove her own marriage; but plaintiff was afraid her evidence would be against him, and so would not examine her. See Lord Valentine's case, in D. P. Cowp. 593; Sacheverell's case, Bul. N. P. 241.

6. PENDRELL v. PENDRELL. H. T. 1731. K. B. Bul. N. P. 287; S. C. 2 Stra. 925.

This was an issue out of Chancery, to try whether the plaintiff was heir to T. O. The marriage and birth being admitted by order of the Court, Lord Raymond, C. J. received the evidence of the mother to prove that the father had access to her; but he would not allow her declarations to be given in evidence till she had been called and denied them upon the cross-examination.

7. GOODRIGHT v. MOSS. E. T. 1777. K. B. Cowp. 594. S. P. REX v. HOOPER. M. T. 1772: K. B. 1. Wils. 340. REX v. BEDALE. 2 Stra. 941. 1076; man who is the of feuding party prove the non-access of the husband, and bastardize the issue.*
S. C. Ca. Temp. Hard. 379; And. 9. REX v. READING. Bul. N. P. 112. REX v. LUFFE. 8 East. 193; REX v. KEA. 11 East 132. Sed vide REX v. WRIGHT. 1 Bott 447. pl. 558.

Per Mansfield, C. J. It is a rule founded on decency, morality, and policy, that the parties shall not be permitted, after marriage, to say that they have had no connexion.

8. REX v. THE INHABITANTS OF KEA. E. T. 1809. K. B. 11 East. 132.

Per Cur. A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness, the principle of public policy precluding her from bearing testimony to that fact, as the contrary rule would tend to affect both the children born during the marriage and the parties themselves. Vide 1 Rol. Abr. 359; Ca. Temp. Hard. 79. 379; 8 East. 193; Salk. 122; Stra. 905. 1016; Andr. 9. 10; alter the rule. But on the ground of necessity, she may be examined as to the fact of her criminal intercourse with another.

9. THE KING v. READING. M. T. 1734. K. B. Ca. Temp. Hard. 79; S. C. And. Rep. 10. 2 Sess. Ca. 286. pl. 175. S. P. REX v. BEDALE. And. 8. REX v. LUFFE. 8 East. 203.

On motion to quash an order of two justices, and two orders of sessions made on it, by which the defendant had been adjudged the father of a bastard. The first order of sessions was a special one, setting forth the circumstances of the case, and charging the defendant, on the oath of a feme covert, with being the father of the bastard. The wife is not a competent witness in law; that is, to prove the whole fact; though it seems she can prove the criminal-conversation between defendant and herself, by reason of the nature of it, as it will seldom admit of other evidence; but this is only from necessity. But it is carried farther; for the wife is the only evidence to prove the absence and want of access of her husband, whereas this might have been made to appear by other witnesses, and therefore the wife shall not be admitted to prove it, as there is no necessity to justify her being evidence in this case. She is therefore not to be admitted to prove that her husband had no access to her, and the testimony of the other witnesses, that he resided seven miles away, shows an apparent possibility of access. It must be very dangerous to lay it down in general, that a wife should be a sufficient sole evidence to bastardize her child, and discharge the husband of the burthen of its maintenance. But our opinion will not be a precedent to determine any other case where there are sufficient witnesses as to the want of access, but the foundation of our judgment is the wife's being sole witness,

* But the wife being examined to prove non-access, does not vitiate an order of bastardy, if the fact be proved by other witnesses; Rex v. Bidall, post; Rex v. Luffe, 8 East. 195.

The declaration of deceased parents as to their having or being married, are admissible.*

And the examination of a woman before a magistrate, under 6 Geo. 2. will be evidence after the woman's death against the reputed father.

If the mother die previous to an order of filiation being made and without having been examined under 6 Geo. 2, c. 31. one may be af-

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terwards made upon the reputed father by means of other evidence, as by the confession of the reputed father, or by the examination of the bastard upon oath. Cohabitation is not sufficient evidence to charge a person as the father of a bastard.

MAY v. MAY. H. T. 1743. K. B. Bul. N. P. 112. S. P. ANON. 12 Vin. 247. T. 6 91. REX v. BROMLEY. 6 T. R. 330.

This was a trial at bar, upon an issue directed out of Chancery, the preamble of an act of parliament reciting, that the plaintiff's father was not married, and to the proof of which he was proved to have been sworn, was given in evidence; yet, upon proof of constant cohabitation, and his owning her upon all other occasions to be his wife, the plaintiff obtained a verdict.

11. REX v. THE INHABITANTS OF RAVENSTONE. M. T. 1793. K. B. 5 T. R. 373.

The mother of a bastard child having sworn that A. B. was its father, the question was, whether the examination of the woman before a magistrate, under the 6 Geo. 2, c. 31. which enacts, that in case any single woman shall, in an examination to be taken in writing, upon oath, before any justice, &c. charge any person with having gotten her with child, it may be lawful for the justice to issue his warrant, for the immediate apprehension of such person, &c. was admissible in evidence, after the woman's death, against the reputed father; on his appearance at the sessions, to abide the order of the Court, according to his recognizance? And the Court were of opinion that it was admissible it being an examination taken by the directions of the statute in a judicial proceeding, and is receivable like depositions under the statute of Philip and Mary, although the proceeding before the magistrate is entirely *ex parte*, and although the party accused is not present at the woman's examination.

12. REX v. THE INHABITANTS OF ST. MARY'S, NOTTINGHAM. M. T. 1787. K. B. 13 East. 57 n

In this case it appeared, that in consequence of the death of the mother of a bastard child, and her not having been, previously to such occurrence, examined under the 6 Geo. 2, c. 31. as to her pregnancy, and who was the reputed father, the bastard herself had been sworn and examined, as to the fact of her being the daughter of A. B., as also A. B. himself, against whom an order of bastardy had been made, which it was now on the above facts attempted to invalidate. *Per Cur.* There is no ground for the objection which has been taken, it appearing that the bastard's evidence was not the only proof relied on. And although it would be ridiculous to examine the Bastard as to the certainty of her father, yet she might properly enough be examined as to some circumstances relating to it; as whether the man, when accused with it, had acknowledged her to be his daughter, and whether she were constantly reputed to be his daughter, and such like. And though the justices could not have compelled the parent to have given evidence, yet, when examined on oath, his statements are to be believed, and he might have confessed the fact.

13. THE KING v. BROWNE. T. T. 1720. K. B. 2 Stra. 811.

An order of Bastardy stated, that the husband had been abroad, during which time the defendant had had carnal knowledge of the wife; and therefore the justices had held him to be the father. *Per Cur.* The order must be quashed, for his lying with her is not a sufficient reason to infer him the father of the child.

III. RIGHTS OF PARENTS TO THE CUSTODY OF THE BASTARD'S PERSON.

1. NEWLAND v. OSMAN. T. T. 1753. cited 1 Burn, J. 256. 23d edit.; S. C. 1 Bott. 466. S. P. RICHARDS v. HODGES. 2 Saund. 83; 1 Pott. 464; 2 Smith Sett. and Rem. 64. 1 Bott. 497. HULLAND v. MALKIN. 2 Wills. 126; S. C. 1 Bott. 488. *semb. contra.*

Debt upon a bond conditioned to indemnify, and save harmless the parish of Eling from a bastard child. Plea that the defendant had maintained, support-

* And so is the declaration or memorandum of a surgeon deceased as to the time of birth; 1 East, 130; Vin Ab. Evidence, T. 691. But the declaration of a father or mother cannot be received after their deaths, to prove the want of access, so as to bastardize a child born during marriage, for they could not be examined to the fact if alive.

ed and nourished the child, to a certain day, that is to say, to the 27th of October last, and that then he offered to take the said child to maintain, which they refused, and that if the churchwardens or any of them have been damned, it is of their own wrong. Replication, that for three weeks, from and after the said 27th day of October, the defendant did not provide nourishment for the child, but failed; and by reason thereof, the plaintiff's after the three weeks, expended 3s. for the maintenance of the child, and so were damned. Demurrer; and joinder in demurrer. The question of law is, whether a putative father, may take a bastard child into his own custody, to maintain it, or whether the parish shall have the care of it. And the case in 2 Saund. 83. was mentioned, wherein the Court held this to be a good plea; 1 Vent. 48; that the father may maintain the child himself, 1 Vent. 210; that the justices can only make an order to maintain so long as the child shall be chargeable. It was held by the Court, with the exception of Foster, J. who doubted, that the putative father might take his child and maintain it himself, and that this has always been given as a reason why orders for the maintenance of such children must not be limited to any certain time.

2. THE KING v. MOSES SOPER. E. T. 1793. 5 T. R. 278.

A child of three years of age being brought up at the instance of its mother, on an *habeas corpus* by the putative father, on whom an order of filiation had been made, and who had obtained the possession of the child by fraud. Lord Kenyon, C. J. said, that the putative father had no right to the custody of the child, and it was accordingly removed to the mother.

3. *REX v. HOPKINS*. T. T. K. B. 7 East. 579; S. C. 3 Smith Rep. 577.

A motion was made for a *habeas corpus* to the defendant, to bring up the body of a child which A. B. claimed to belong to her, alleging herself to be the mother of it. It appeared upon the affidavit that this was a dispute to whom the child really belonged, and who was its mother. The affidavit stated the birth of the child, or rather some circumstances from which to infer that the child was born of A. B. and it was stated to have been in her possession; and that it was obtained from her by means of artifice. *Per Cur.* In this case it appears that the mother had the child in her care during the period of nurture, and the possession was then undisturbed: that she was divested of it by an act of stratagem; that she re-possessed herself of it, and that it had been again taken from her by force; then presuming in favour of the party, having the possession, that she has the right; we think that, in the exercise of our authority to grant the writ, we may grant it to replace the child in the possession of A. B. leaving it to the Court of Chancery to settle afterwards, according to law, in whose possession it ought to be; we think that the long possession of the child authorises us to grant the writ.—Writ granted.

See 5 East. 224 n.; 5 T. R. 278; 10 Ves. jun. 59.

4. *Ex parte ANN KNER*. M. T. 1804. C. P. 1 N. R. 148.

This was an application for a *habeas corpus* to bring up the body of an infant illegitimate child, in order to restore it to the mother; it appeared by the affidavits that the child had been placed by consent of the father and mother, under the care of a nurse; that it was afterwards removed by the father to another woman; that the father then went abroad, having entrusted Mr. B. a friend, with the superintendence of the child; that Mr. B. (to whom the writ was prayed to be directed) wished to have the child placed with some person where the mother could have access to the child, and under those circumstances was willing to pay for its maintenance, but the mother insisted upon having it delivered up to her. The child being brought up, and the mother being present, it was urged that it would be for the benefit of the child that it should be placed with some person whom the father might approve; as the father, from his situation in life, was better able to maintain the child than the mother.

Per Cur. There is no affidavit before the Court to show any ground of apprehension that the child would incur any danger from being left with the mother; it is not unlikely indeed that, by granting this application, we may be doing a great prejudice to the child; but it is not probable that it will be so ad-

The putative father may take his bastard child from the parish and maintain it himself.

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But where the possession of the child was obtained by fraud, the Court ordered it to be restored to the mother.

And the Court on a subsequent case granted a *habeas corpus*, in order that a bastard child within the age of nurture might be restored to the possession of the mother, who had had the possession for some time, claiming it as her own, but had been dispossessed of it by artifice.

And it would appear to be correct as a general proposition that the mother is entitled [184] to the custody of her

illegitimate child in preference to the father, though the latter may be better able to educate it.

Sed qu. whether the point be yet settled.*

vantageously brought up under her care, as under the care of some person whom the father approves of. Nevertheless, the mother must have the child, unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother.

5. *STRANGEWAYS v. ROBINSON*. T. T. 1812. C. P. 4 Taunt. 498.

This was an action of debt on bond conditioned for payment of a weekly sum for maintenance of a bastard child so long as it would be chargeable; to which the defendants pleaded, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver the child to him (without stating that the child was in their possession). Sir J. Mansfield, C. J. in delivering the judgment of the Court, concluded in the following words; "I say nothing upon the grand point, whether, after the child is out of the age of nurture, any father whatsoever, be he who he may, can go to the mother and claim the custody of the child; upon that point the Court gives no opinion."—Judgment for the plaintiff.

IV. LIABILITY OF PARENTS.

(A) AT COMMON LAW.

1. *HESKETH v. GOWING*. E. T. 1804. K. B. 5 Esp. 131.

A person who admits a bastard child to be his, is liable for its nursing, though no order of filiation has been made.

To defeat an action against the defendant for necessities furnished to his illegitimate child, which he had admitted to be his by having made several visits whilst it was at nurse, it was proved that the defendant had taken the child under his roof, and that its mother had withdrawn it without his consent, and placed it under the plaintiff's care; on the examination of the defendant's witnesses, they admitted that the defendant knew the child had been sent to the plaintiff, and that he had suffered the child to remain under the plaintiff's care without taking any steps to get it back again. It also appeared that no order of filiation had been made. *Sed per Lord Ellenborough, C. J.* The evidence proved that the child was put to the plaintiff to nurse, with whom the defendant knew she had been before, and where he had visited; it was also very plain that when last taken away, the defendant knew where the child was, and that he took no steps to take it back; his acquiescence in the child's continuance there was an acquiescence in his former liability.—Verdict for plaintiff.

2. *SCOTT v. NELSON*. 1764. N. P. K. B. Esp. Dig. 95. S. P. Anon. H. T. 1680. K. B. 2 Show. 184.

So he is liable though put out [185] by its mother's uncle, if the father subsequently promises.

In *assumpsit* brought for nursing a bastard child, it appeared that it had not been put out by the defendant, who was its father, but by the mother's uncle; the defendant having afterwards promised to pay for it, it was held that the action was well brought. For, by Lord Mansfield, C. J. the defendant was under an obligation to provide for the child; his bare approbation should be construed into a promise, and be sufficient to bind him.

3. *SHAW v. WHITEMAN*. H. T. 1791. N. P. Peake. 42.

And in such an action, under a parol agreement made by the father with the mother, it is no defence to prove the child was not begotten by him.

In an action of *assumpsit* for board of defendant's illegitimate child, it appeared that the defendant had agreed to allow 7s. per week to the mother for the maintenance of the child, and that he had paid up to a certain time, according to the agreement; but now refused, on the ground that he had ascertained the right father of the child; but Lord Kenyon, C. J. said, that that evidence could not be received on the present issue, which was, whether the contract was right or wrong; if the defendant is not the father, he has his remedy by applying to a magistrate to have the child filiated. On motion for a new trial, the Court refused the rule.

(B) BY STATUTE.†

(a) *Liability of reputed father to give security previous to the birth.*

1. *REX v. MARTYN AND FULHAM*. M. T. 1810. K. B. 13 East. 55.

An application had been made to certain magistrates, for a summons against
* *Vide ante*, vol. i. 85. that an illegitimate daughter, under the care of her putative father, is within the 4 & 5 P. & M. c. 8.

† By the 6 Geo. 2. c. 32. s. 1. "Whereas the laws now in being are not sufficient to provide for the securing and indemnifying parishes, and other places from the great charges

A. B. to appear before them for neglecting to obey an order of bastardy, which they had refused to issue on certain grounds which it is not necessary to disclose, as far as relates to the following objection, which, *inter alia*, was urged upon a rule now coming before the Court, calling upon them to show cause why a *mandamus* should not issue to them to compel them to issue the above summons, as an argument in favour of the defendants, viz. that the stat. 49 G. 3. c. 68. s. 3. which, after reciting "that parishes are often put to great expence in enforcing the performance of orders of maintenance made on the filiation of bastard children, "enacts, that if any reputed father, &c. on whom any order of filiation or maintenance shall have been made, shall neglect or refuse to pay any sum of money which he shall have been ordered to pay for the relief of any such bastard child, by any order, &c. it shall be lawful for any justice of the peace; and he is thereby required upon complaint, &c. by any one of the overseers of the poor of any parish, &c. liable to the maintenance of such bastard, or where such bastard shall then be; and upon proof on oath of the

Although the stat. 49 [186] Geo. 3. c. 68, s. 3, directs a magistrate upon complaint by any one of the overseers of the poor, and proof of an order made for payment of the maintenance of a bastard, and non-payment

frequently arising from children begotten and born out of lawful matrimony," it is enacted, that, "if any single woman shall be delivered of a bastard child which shall be chargeable, or likely to become chargeable, to any parish or extra parochial place, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish or extra parochial place, and shall in either of such cases, in an examination to be taken in writing upon oath, before one justice of the county, city, or town corporate, where such parish or place shall lie, charge any person having begotten her with child, it shall be lawful for such justice, upon application made to him by the overseers of the poor of such parish, or one of them, or by any substantial householder of such extra parochial place, to issue out his warrant for the immediate apprehending of such person so charged as aforesaid, and for bringing him before such justice, or before any other of his majesty's justices of the peace for such county, city, or town corporate. And the justices before whom such person shall be brought shall commit him to the common gaol or house of correction, unless he shall give security to indemnify such parish or place, or shall enter into recognizance with sufficient surety, upon condition to appear at the next general quarter or general session of the peace, to be holden for such county or liberty, and to abide and perform such order or orders as shall be made in pursuance of an act passed in the 18th year of the reign of her late majesty Queen Elizabeth, concerning bastards begotten and born out of lawful matrimony." But by 49 Geo. 3. c. 68. so much of the 6 Geo. 2. as authorizes the justices before whom the reputed father of a bastard child shall be brought, in cases where the woman has not been delivered, to commit such reputed father to the common gaol, or house of correction, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance, with sufficient surety, upon condition to appear at the next general quarter session, or general session of the peace, is repealed, for the purpose of re-enactment with additional provisions, the words of which additional provisions are (immediately after the words "abide and perform such order or orders as shall be made in pursuance of the 18th of Elizabeth,") as follow; "unless one such justice as aforesaid shall have certified in writing, under his hand, to such general quarter session, or general session of the peace, that it had been proved before him, on the oath of one creditable witness, that such single woman had not been then delivered, or had been delivered within one month only previous to the day on which such general quarter session, or general session of the peace shall be holden, or unless two justices of the peace of such county, &c. shall have certified in writing under their hands to the next, or where such woman shall not have been delivered as aforesaid, then to the immediately subsequent general quarter session, or general session of the peace, that an order of filiation had been already made on the person so charged, or that such order was not then requisite to be made on account of the death of the child born a bastard, or for other like sufficient reason; in each of which first mentioned cases, it shall be lawful for the justices assembled, at such general quarter session, or general session of the peace, to respite such recognizance to the then next general quarter session, or general session of the peace, to be holden for such county, &c. without requiring the personal attendance of the putative father so bound, or of that of his surety or sureties; and in either of the two last mentioned cases, it shall be lawful for the justices assembled as aforesaid wholly to discharge such recognizance." "And on application made by any such person, who shall be committed to any gaol or house of correction, or by any person on his behalf, to any justice residing in or near the limits where such parish or place shall lie, such justice shall summon the overseers of the poor of such parish, or one or more substantial householders of such extra parochial place, to appear before him at a time and place to be mentioned in such summons, to show cause why such person should not be discharged; and if no order shall appear to have been made in pursuance of the 18 Eliz. within six weeks after such woman shall have been delivered, such justice may discharge him from his imprisonment." 6 Geo. 2. c. 31.

thereof, to
issue his
warrant
to apprehend
the
reputed fa-
ther, yet
he ought in
the first in-
stance to
summon
him to
[187]
show
cause.

A person
acting as
guardian of
the poor of
a parish
united with
other pa-
rishes, un-
der the 22
Geo. 3. c.
83. and
who, al-
though not
legally ap-
pointed, is
acknow-
ledged by
the parish,
may apply
to a magis-

order for payment of such sum, and of such sum being unpaid, and of a demand and refusal, &c. to issue his warrant to apprehend such reputed father, and to bring him before such justices to answer such complaint; and if he do not pay, &c. to commit him, &c." was mandatory on the justice to issue his warrant in slander, and not a summons only. *Per Cur.* It is the general duty of magistrates, where the complaint is merely for the non-payment of money, to issue a summons in the first instance, before they grant a warrant of apprehension; and it requires very strong words to take away the necessity of such a summons; the use of which is obvious, viz. to enable the party summoned to show that there is no ground for the complaint to authorise his apprehension.

2. *REX V. MARTYN AND FULHAM.* M. T. 1810. K. B. 13 East. 55.

Some other parishes united with the parish of Dunsfold (under the authority of 22 Geo. 3. c. 83), for the relief and employment of their poor, had regularly appointed one Sadler guardian of the poor house in the parish of Dunsfold, and had contracted with him to continue in office for a second year; in that character he applied to the justices to take the examination of a female pauper of the parish of Dunsfold, for the purpose of filiating a bastard child; and the justices refused to interfere, on the ground that Sadler was not a regular overseer of the poor of the parish, but merely overseer of the workhouse there; as also that some doubt might be entertained respecting the title by which he even held that appointment for the second year, in which year this exercise of his supposed duty occurred. A *mandamus* was issued to compel the parties to proceed on the complaint thus preferred; and the Court of King's Bench were unanimously of opinion that Sadler was sufficiently a guardian of the poor *de facto* for the parish of Dunsfold to act in that character for the immediate purpose, especially as no opposition was made by the regular overseers of the poor against him as usurping their authority. He did nothing in this case which assumed to bind the parish, and therefore the legality of his appointment could not come in question. See 6 T. R. 552; 2 East. 175.

3. *DICKENSON V. BROWN AND OTHERS.* M. T. 1795. N. P. Peake. 234.

The father
of a bastard
brought be-
fore a ma-
gistrate,
and libe-
rated on
condition
that he find
sureties,
may, if he
neglect to
provide
them, be

This was an action of trespass which arose under the following circumstances. Plaintiff was apprehended as the putative father of a bastard child under a magistrate's warrant; after his apprehension he agreed to indemnify the parish by entering into a bond with two sureties; but it appeared only one surety signed the bond; in consequence of which plaintiff was apprehended a second time under the same warrant, to compel him to procure another surety; plaintiff's contention that the second arrest was illegal under the same warrant, and that a new warrant should have been procured, but Lord Kenyon, C. J. said, a warrant, if not fully executed, is good so long as the magistrate lives who signed it, because no time is mentioned as a return; and this, it is evident, was not fully executed.—Verdict for the defendants.

retaken upon the same warrant, provided the magistrate be alive.

4. *REX V. CHANDLER.* M. T. 1724. K. B. 1 Stra. 612; S. C. 2 Ld. Raym. 1368.

An indict-
ment for
secreting a
[188]
woman big
with child,
so as to

Indictment for secreting a woman big with an illegitimate child, so that she could not be had to give evidence about the father. The defendant demurred; and by the Court judgment must be for the defendant, for the child cannot be illegitimate before it is born, there being always a possibility that it may be born in lawful wedlock.

prevent her giving evidence about the father, cannot be sustained.*

(b) *Liability of the reputed father to indemnify the parish.*

1. *Of the statutes relating thereto.*

The reput-
ed father

By the 6 Geo. 2. c. 31., now by the 49 Geo. 3. c. 68. s. 2., the justice be-

* And by 6 Geo. 2. c. 31. s. 4. it shall not be lawful for any justice to send for any woman before she shall be delivered, and one month after, in order to her being examined concerning her pregnancy, or to compel any woman before she shall be delivered to answer any questions relating to her pregnancy.

fore whom the party shall be brought shall commit him, unless he shall give security to indemnify the parish, or enter into recognizance to appear at the sessions.

shall give security to indemnify the parish. And the overseers.

By the 54 Geo. 3. c. 170. s. 8. it is enacted, that all securities given or received, or hereafter to be given, for indemnifying any district, parish, township, or hamlet, for the maintenance of any bastard child or children respectively, or any expences in any way occasioned by such district, parish, township, or hamlet, or chargeable thereto, shall be, and the same are hereby declared to be, vested in the overseers of the poor of such parish, district, township, or hamlet, for the time being; and that it shall and may be lawful for the overseers of the poor of such district, parish, township, or hamlet, to sue for the same as and by their description of overseers of such district, parish, township, or hamlet; and such action so commenced by such overseers shall in no ways abate by reason of any change of the overseers of such district, parish, township, or hamlet, pending the same, but shall be proceeded in by such overseers for the time being as if no such change had taken place, any law, statute, or custom to the contrary in any wise notwithstanding.

2. ADDEY v. WOOLLEY. H. T. 1819. C. P. 8 Taunt. 691; S. C. 3 Moore. 21.

Plea to an action of debt on a bastardy-bond, that the plaintiffs were not, when this action was commenced, overseers of the parish, &c. Demurrer, and joinder. *Per Cur.* The plaintiffs were overseers when the bond in question was given. The legislature, by the 54 Geo. 3. c. 170. s. 8. has expressly declared that the right to sue on securities of the above nature shall be vested in the overseers of, &c. "for the time being," and we cannot construe the words of the statute otherwise than as intending that the action should be brought by the overseers who may be in office at the time the right to sue accrued.—Judgment for defendant.

For the time being may sue on such securities.

By 54 Geo. 3. c. 170. s. 9. no inhabitant or person rated, or liable to be rated, to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be, by reason thereof, an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates, &c. or touching any bastards chargeable, or likely to become chargeable, to such district, parish, township, or hamlet, or the recovery of any sum or sums for the charges or maintenance of such bastards.

In such action the inhabitants are competent witnesses. [189]

2. Of the bonds of Indemnity.

1. MIDDLEHAM v. BELLERBY. E. T. 1813. K. B. 1 M. & S. 310.

The putative father of a bastard child gave a voluntary bond to the parish officers, conditioned for the payment of a certain sum periodically, "till the child should be deemed capable of providing for herself." On demurrer to the declaration on this bond, two objections were made; 1st, That the condition went beyond the indemnifying the parish, it being an actual condition to pay certain sums periodically at all events. 2dly, That "deemed capable" was indefinite and uncertain, and therefore bad as a condition. The Court of King's Bench said, that if the defendant had been apprehended under the statute of 6 Geo. 2. c. 31. and given the bond in order to relieve himself from confinement, there might have been weight in the first objection. but this was a voluntary bond, and the parties were not acting under the statute, and therefore, in such a case, it did not apply. Then the words "deemed capable," must be intended to mean "deemed so by a jury," and then that would be sufficiently definite. See 6 East. 110; 4 Taunt. 498.

A bastardy bond given voluntarily to provide for a child, until it should be deemed capable of providing for itself;

2. SPANGWAY v. ROBINSON. T. T. 1812. C. P. 4 Taunt. 498.

The condition of a bond on which the present action was brought, recited, that H. B. a single woman, had then lately been delivered of a female bastard child, which was then chargeable, &c. and charged the defendant with being the father of the same, and the defendant had already paid the expenses of the month, &c. It was contended for the defendant, on the authority of Cole v. Gower, 6 East. 112. that the bond was void, as being contrary to public poli-

Or a bond condition ed for pay ment of a certain weekly sum, while the child is

is chargeable; are not illegal,

cy. But the Court were of opinion, that the parish officers being empowered by the legislature, to take security for the maintenance of such bastard children, and having estimated the expence of such maintenance at the sum conditioned for in the bond, which was evidence of the defendant's assent, to such arrangement, there was no good ground for impugning the agreement.

3, HAYS v. BRYANS. T. T. 1789. C. P. 1 H. Bl. 253.

Though no order of Justices for its maintenance has been made.

To an action on a bastardy-bond, given to indemnify the parish against the charges which might arise on account of the maintenance of a child as one E. W. then went with, the defendant pleaded, 1st, *non est factum*; and 2d, *non damnificati*. And the plaintiff replied, that E. W. had a child, and that the overseers had been compelled to provide food, &c. Rejoinder, that no order of justices had been made for its maintenance. On surrejoinder, that the overseers were not damaged, according to the meaning of the bond, issue was joined. At the trial it was proved that the defendant had undertaken to pay a certain sum per week, and that he had continued to pay until the commencement of this action. For the defendant it was objected, that the parish had no right to maintain the child without an order of the justices. But the judge who tried the cause entertained a different opinion, and the plaintiff obtained a verdict. On motion to set it aside, the Court said the verdict was correct, and that the parish officers were legally bound to provide for the child. Rule discharged.

4. STRANGEWAYS v. ROBINSON. T. T. 1812 C. P. 4 Taunt. 498.

And where to an action on such a bond, the plea was, that an obligor offered to take and maintain the child after the age of seven years but the parish officers refused to deliver it up, the Court held it bad, as it did not state that the child was in the custody of the parish, nor at what period after the seven years the offer was made, nor what sum accrued due during the time that intervened between the termination of the seven years and the making of the offer,

To an action on a bond conditioned for payment of a specified weekly sum to the overseers, &c. of the parish, &c. for the maintenance of a bastard child. The defendant pleaded performance of the condition of the bond up to the period when the child had attained the age of seven years; and that then, to wit, &c. from that time, to maintain, &c. the said child at his own cost and charge, and entirely to relieve the inhabitant's of the township from any charge for the further maintenance &c. and requested that the child might then be delivered to him, but that the overseers refused to deliver up the said child as requested, and continued, in their own wrong, and contrary to the defendants will, to bring up and maintain the said child, at the costs and charges of the inhabitant's &c. Replication, after denying the request of the defendant, and the refusal by the overseers as stated, that the child was, from the birth till, and at the period of, the supposed request, in the custody and under the controul of the mother, who made the said refusal, if any; and that, after notice thereof, the overseers refused to afford any further relief for support of the said child; and that thereupon an order was made upon them by a justice of the peace, to allow H. R., late H. B. support to a certain extent until they should appear before him; and show good cause for withholding the same; and that having no such good cause as aforesaid, the said magistrate ordered a certain allowance to be paid to the said H. B., weekly, towards the support, &c. Averment, that H. R. and the child mentioned in the prior order, were the same persons with H. B. and the child mentioned in the latter order; and that no cause as aforesaid having been shown, by the overseers, and the order remained in full force, and that the overseers had advanced a weekly allowance as per order, from the making of the same till the commencement of this action, to a considerable amount, and that the defendant, although, &c. had refused, &c. and that the said sum remained unpaid. On general demurrer to this replication, the plaintiff's counsel contended that the plea was bad, inasmuch as it alleged, as good ground for not performing the condition of the bond, that the overseers prevented his so doing, by refusing to accede to his request to have custody over the child; but did not aver that the overseers were, by having custody of the child, invested with the power of complying with such request. In which the Court concurred; and said, that the defendant should have alleged such a possession by the overseers as they could not deliver the child out of the mother's custody, which it appeared was the case. Judgment for plaintiff.

5. KIRK v. STRICKLAND. M. T. 1780. K. B. 2 Doug. 449.

But the da-

In debt on an indemnity bond, it appeared, on a motion for a rule to show

cause why the defendant should not be discharged upon filing common bail, to be for the indemnification of a parish against a bastard child, and that the penalty was 50*l.* The plaintiff, in his affidavit to hold to bail, had sworn that the defendant was justly indebted to him in that sum, and that the defendant now swore that only 3*l.* and some odd shillings were really due. *Per Cur.* The conduct of the plaintiff was unjustifiable; he was liable to an action. In some cases the penalty is the real debt; but in other cases the bail can only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition.

6. BRANGWIN v. PERROT. E. T. 1773. C. P. 2 Blac. 1190.

On motion for leave to pay 40*l.* being the whole penalty of a bond to indemnify a parish against a bastard child, into court, with costs, it was objected that this was an action for a simple breach of the bond, in which the parish was entitled to recover; after which the penalty shall still remain in force, to answer subsequent breaches, as they may arise in *infinitum*. But this Court would not allow; and De Grey, C. J. said, this was so plain a case, that nothing that could be said could make it plainer. The bond ascertains the damage by consent of the parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more.

7. WILDE v. CLARKSON. E. T. 1795. K. B. 6 T. R. 303.

A bond had been given to indemnify the parish against a bastard child. An action having been brought on the bond, the Court was moved, that upon payment of the penalty and costs into Court, satisfaction might be entered on the roll. It was opposed on the ground that it had been decided, in *Lonsdale and Church*, 2 T. R. 333. that damages might be recovered beyond the penalty on the bond.

But the Court said, the case cited could not be sustained; for the obligor, who became bound in a penalty of 1000*l.*, might be called upon to pay 10,000*l.* And as the plaintiff cannot recover more than the penalty and costs, and cannot be in a better situation if he proceeds.—Rule absolute.

8. SHUTT v. PROCTER* E. T. 1816. C. P. 2 Marsh. 226.

A rule had been obtained calling on the plaintiff to show cause why the proceedings in an action on a bastardy bond should not be stayed, and the bond be delivered up and cancelled, on payment of the penalty of the bond and costs. After cause shown, the Court said, the object of the contract is to indemnify the parish, and that object is secured by the penalty. The party who enters into it is interested not to pay the penalty entire, if the damages do not amount to it; but if he be conscious that they do, it becomes his interest to pay the penalty; because otherwise he would only be incurring further costs. He must be the best judge of that; and if he think he cannot resist the payment of the full penalty, it is impossible to say that, on paying the whole of the demand which the parish have on him, he is not entitled to be relieved from all further proceedings. Rule absolute.

9. *REX v. THE INHABITANTS OF ST. MARY'S, NOTTINGHAM.* E. T. 1737. K. B. 13 East. 57. n.

Per Cur. If a bastard gain a settlement in a different parish from that in which it was born, that parish shall maintain it; and the security given by the reputed father to indemnify the parish extends only to the cases where the child has not gained another settlement for itself elsewhere.

3. *Of bills, notes, and deposits of sums of money as an indemnity.*

1. COLE AND OTHERS v. GOWER AND ANOTHER. H. T. 1805. K. B. 6 East. 100; S. C. 2 Smith. Rep. 243. S. P. WILD v. GRIFFIN. Cited 6 East. 114; S. C. 2 Smith. Rep. 251; S. C. 5 Esp. 142.

The defendant gave the plaintiffs, parish officers, three several promissory notes; one for 6*l.* and the other two for 7*l.* each, payable at all even's, the plaintiffs undertaking to provide for a child, of which he was the putative father. The woman, after the notes were given, was delivered of a still-born child. An action having been brought on one of these notes, the defendant

mayes incurred on-ly, and not the penalty can be recovered.

And if they exceed the penalty the excess cannot be recovered.

Therefore, upon bringing the penalty and costs into court, satisfaction will be entered on the record.

And the proceedings stayed. [192]

The father of a bastard is only bound to indemnify the parish till the bastard has acquired another settlement.

Overseers of the poor should proceed to take an indemnity in cases of bastardy, from the putative father, under the 6 G. 2. c. 31. s. 1.

* The authority in this case was doubted by Lord Ellenborough, C. J. in 1 B. & A. 496. and cannot

tendered 5*l.*, which was more than sufficient to defray the actual expences to which the parish had been put, and pleaded the general issue as to the rest. On the trial a special case was reserved. The whole Court were clear that the plaintiffs were not entitled to recover beyond the sum paid into court. whether, considering the contract void on principles of public policy, or with relation to the individuals with whom it was made, as a contract for gain or loss by persons clothed with a public trust upon the subject matter of this trust, and giving them an interest in the mal-execution of it; and observed, that the law did not mean to make this a matter of speculation of loss or gain to the parish that it had said that the security should be given to them in order to indemnify the parish; and having so said, it had excluded every other consideration. See Cowp. 39.

And where a person

[193] paid money under an order of maintenance for a period during which the child was, with out his knowledge supported in the Foundling, it was hold en that he

So where a payment has been made as a composition with the parish, and the child dies, the surplus may be recovered.

The contract being illegal, it was no defence to say that the defendants were out of office before the action was commenced, and that they had paid over the

And if the overseer receive a [194] sum as a

2. HODGSON v. WILLIAMS. H. T. 1806. C. P. N. P. 6 Esp. 29.

The plaintiff had been declared the father of a bastard, and, under an order of maintenance, paid several sums of money. Having subsequently discovered that the child, during the time he had paid the above sums, and during the time he had several inquiries respecting the child, and always refused information on the subject, had been in the Foundling Hospital, he brought the present action to recover the money so paid, against the defendant; overseer, to whom the above sums had been given. The defence was, that money voluntarily paid could not be recovered back again. But Mansfield, C. J. said, Must not a man who is said to pay money voluntarily have a full knowledge of all the circumstances under which the demand is made? If the circumstances are concealed, the payment so made is not fairly made, but by mistake, and mistake is a ground of assumption. Upon what principle can the overseer withhold the money? The parish was put to an expence, for the child was maintained by the Foundling.—Verdict for plaintiff.

3. STAINFORTH v. STAGGS. T. T. 1803. K. B. N. P. 1 Campb. 398; S. C. 564.

The plaintiff, the putative father of a bastard child, had paid 40*l.* to the defendants, parish officers, in pursuance of an agreement to indemnify the parish. It appeared the child died when only 4*l.* had been expended; the plaintiff brought the present action to recover the surplus money. *Per Lawrence, J.* It is clear that the surplus, after deducting the charges actually incurred, may be recovered; the plaintiff had a verdict, and the Court of K. B. refused a rule to set it aside. See 6 East. 110; 5 Esp. 141.

4. TOWNSON v. WILSON AND OTHERS. T. T. 1808. N. P. 1 Camb. 396.

In this action for money had and received, it appeared the plaintiff having gotten one B. with child, and a warrant having issued against him, gave 40*l.* to the parish officers to indemnify him. The receipt for the money was signed by the defendants, as churchwardens. B. was delivered of a child which lived but a few weeks, and defendant's, it appeared, before the commencement of the action, had ceased to be officers; and had paid over the surplus money to their successors in office. Defendants, for these reasons, contended that the action should be brought against the present parish officers; but Lord Ellenborough said; it was clear that the contract under which the money was paid, was illegal, because the parish was interested in shortening the life of the child; and as in an illegal transaction, a person could not discharge himself, by paying over the money, to another, he was of opinion that the surplus might be recovered. Verdict for plaintiff.

money to their successors

5. REX v. MARTIN. Sum. Ass. 1809. K. B. N. P. 2 Campb. 1809.

The defendant, being indicted, as overseer, for rendering false accounts, it appeared that he had received a sum of money, in pursuance of a composition between him on behalf of the parish, and the putative father of a bastard child, for which he had never rendered any account. *Lord Ellenborough, C. J.*

* It lies upon the overseers to prove what expences have been incurred; *Watkins v. Hewlett*, per Dallas, C. J. 1819. cited Manning. N. P. Index, 70.

The parish has borne the expense of supporting the child, and, being deprived of a fund legally applicable to them, was defrauded and damaged. Although the defendant would have been liable to repay the surplus to the putative father, yet the overseer, having received the money for the benefit of the parish, was bound to insert it in his account; and not having done so, he is liable to an indictment.

6. *WATKINS v. HEWLETT*. E. T. 1819. C. P. 3 Moore 211; S. C. 1 B. & B. 1.

This action was brought to recover a sum of money paid by the plaintiff, as putative father of a bastard child, to the defendant, a parish officer, for the probable expenses of maintaining such child. The defendant gave a receipt in the following terms; "Received of, &c. a bill of exchange for, &c., which, when paid, will discharge the plaintiff from the expenses of an illegitimate child, which is likely to become chargeable to my parish—" The child died a few days after its birth, and it did not appear that any part of the money had been expended in any respect for the use of the child, but the defendant had put the bill in circulation. On the receipt being offered in evidence of the payment of the money, the defendant's counsel objected to its admissibility, on the ground that the introduction of the consideration clothed it with the character of an agreement, and rendered it liable to a stamp of that denomination. But the plaintiff had a verdict; and on motion for a rule nisi for the entry of a nonsuit, the Court were unanimous, that as the action was not grounded on the terms of the receipt, a statement then of the reason why the money was paid could not affect the use that was now intended to be made of it, and the rule was refused.

Where a receipt given by a parish officer to the putative father of a bastard child, stated that it was given for "a bill of exchange which, when paid, would exonerate the said father from the expenses of an illegitimate child, which was likely to become chargeable," &c. it was held that a common receipt stamp adequate to the amount was sufficient. [195] An original order of bastardy may be made at the sessions.*

(c) *Liability of reputed father to obey an order of filiation and maintenance.*

1. *Of the power of the sessions to make such order; and when it ought to be exercised.*

REX. v. GREAVES. E. T. 1781. K. B. 2 Doug. 632. a.

An original order of bastardy, having been made at Nottingham Sessions, it was removed into this Court; and on a rule to show cause why it should not be quashed, the principal objection was, that the sessions have no original jurisdiction in making orders of bastardy. But, *Buller, J.* read from 2 Bott. 119. Slater's case; and the Court were clearly of opinion, that the sessions have an original jurisdiction. Order confirmed.

* By 18 Eliz. c. 3. s. 2. concerning bastards begotten and born out of lawful matrimony (an offence against God's law and man's law,) "the said bastard being now left to be kept at the charges of the parish where they be born, to the great burden of the same parish, and in defrauding of the relief of the impotent and aged poor of the same parish, and to the evil example and encouragement of lewd life; it is ordained and enacted, that two justices of the peace, (whereof one to be of the quorum, in or next unto the limits where the parish church is, within which parish such bastard shall be born, upon examination of the cause and circumstance) shall and may, by their discretion, take order as well for the mother and reputed father of such bastard child, as also for the better relief of every such parish, in part or in all; and shall and may likewise, by like discretion take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient; and if after the same order by them subscribed under their hands, and the said persons, viz. mother or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then every such party so making default in not performing of the said order, to be committed to ward to the common gaol, there to remain without bail or mainprize, except he, she, or they, shall put in sufficient surety to perform the said order, or else personally to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken, and also to abide such order as the said justices of the peace, or the more part of them, then and there shall take in that behalf (if they then and there shall take any;) and that if at the said sessions the said justices shall take no other order, than to abide and perform the order before made, as is aforesaid."

And by stat. 49 Geo. 3.c. 68. s. 1. after reciting that the provisions of the 18 Eliz. are found to be inadequate to the purposes of indemnifying parishes against the charges and expenses incurred by the apprehending and securing the reputed father, and also by the obtaining the order of filiation; and that it is expedient that such charges and expenses should be borne and discharged by the adjudged reputed father of such bastard child or children,

2. REX. v. PRIGE. H. T. 1795. K. B. 6 T. R. 147.

Although
the sessions

The defendant, being declared the reputed father of a bastard child, was at the discretion of the justices by whom such adjudication shall be made, either in the court of quarter sessions or otherwise, not exceeding the amount hereinafter mentioned, it is enacted, "that every person who shall hereafter be adjudged to be the reputed father of any bastard child or children, shall be chargeable with, and liable to, the payment of all reasonable charges and expences incident to the birth of such bastard child or children, & also to the payment of the reasonable costs of apprehending and securing such reputed father, and also to the payment of the costs of the order of filiation; such costs of apprehending and securing the reputed father, and of the order of filiation, not to exceed the sum of 10*l*.; and all such charges, expences, and costs, shall be duly and respectively ascertained on oath before the justices of the peace or the court of quarter sessions making such order of filiation, which oath such justices or court are hereby respectively empowered to administer."

By sect 3. after reciting that, "whereas parishes are often put to great expence in enforcing the performance of orders of maintenance made on the filiation of bastard children, it is enacted, that if any reputed father or any mother of such bastard child or children on whom any order of filiation or maintenance of such child or children, shall have been made by the court of quarter sessions, or which shall have been made by two justices of the peace, and confirmed by the court of quarter sessions, or against which no appeal shall have been made at the court of quarter sessions, shall neglect or refuse to pay any sum or sums of money which he or she shall have been ordered to pay towards the evidence or other sustentation for the relief of any such bastard child or children by any such order, it shall be lawful for any justice of the peace of the county, riding, division, city, liberty, or town corporate, in which such reputed father or such mother shall happen to be; and the said justice is hereby required, upon complaint made to him by any of the overseers of the poor of any parish, township, or place, liable to the maintenance or support of such bastard child or children, or where such bastard child or children shall then be, and upon proof on oath of such order for the payment of such sum or sums of money, and of such sum or sums of money being unpaid, and of a demand of such payment having been made, and a refusal to pay the same, or that such reputed father or such mother hath left his or her usual place of abode, and hath avoided a demand thereof being made by such overseer, to issue his warrant to apprehend such reputed father or such mother, and to bring him or her before such justice or any other justice of the peace, of the same county, riding, division, city, liberty, or town corporate, to answer such complaint; and if such reputed father or such mother shall not pay such sum or sums of money as shall appear to the said justice before whom such reputed father or such mother shall be brought to be due and unpaid, or shall not show to such justice some reasonable and sufficient cause for not so doing it shall be lawful for such justice, and the said justice is hereby required to commit such reputed father or such mother to the public house of correction, or common gaol of the said county, to be there kept to hard labour for the space of three months, unless such reputed father or such mother shall, before the expiration of the said three months, pay or cause to be paid to one of the overseers of the poor of the parish, township, or place on whose behalf such complaint as aforesaid was made, the said sum or sums of money so due, and unpaid as aforesaid, and so from time to time, and as often as such reputed father or such mother shall in manner aforesaid neglect or refuse to pay, any other sum or sums of money that shall afterwards become due, by virtue of, and under such order, after the expiration of, or discharge from, any such former imprisonment as aforesaid."

Sec. 4. provides and enacts, "that all such charges, expenses, and costs, shall be wholly subject to the discretion of the justices, or court of quarter sessions, who shall make such order of filiation. and the justices or court of quarter session, are hereby authorised, if they shall see fit, to allow and order payment of the whole, or any part thereof; provided always, that the costs of apprehending and securing the reputed father, and of the order of filiation, shall not in any case exceed the sum of 10*l*.; and for securing the due payment of the same, after such allowance and order as aforesaid, all and every the powers, authorities, provisions, clauses, matters, and things contained in the said act passed in the 18 Eliz. concerning bastards begotten and born out of lawful matrimony, shall be respectively observed, used, and practised, in the execution of this act, and shall be construed, deemed, and taken to apply, as fully and effectually to all intents and purposes, as if the said powers, authorities, provisions, clauses, matters, and things, were specially recited and re-enacted in this act."

And by the 3 Car. 1. c. 4. s. 15. all the justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning that part of the said statute that by justices of the peace in the several counties are by the said statute limited to be done. Upon which statute of the 3 Car. there hath been great diversity of opinion, whether or no the sessions have power thereby to make an original order in the case of bastardy, without the matter coming before them by way of appeal. But it seems now to be fully settled, that the sessions have power to make an original order; *vide*, cases in the text.

compelled to enter into a recognizance, with sureties, conditioned, that if the defendant should appear, &c. and perform the order as directed by the 18 Eliz. c. 3. that then the same should be null and void. The defendant, having appeared, was ordered to pay a certain sum for the lying-in, &c.; and further ordered to find sureties for the performance of that order, which he refused to do on the ground that the sessions had no power to make such an order; he being committed for the disobedience removed by *certiorari* the order into this Court. On the case coming before the court, they said it was too clear to be argued, and cited a MS: case of the King v. Fox, "wherein it was determined, under similar circumstances, that the justices had no power to compel the reputed father to find sureties for the performance of an order of bastardy. under the 18 Eliz. and that the 6 Geo. 2. not having extended their power in that respect, the order must be quashed;" therefore the Court ordered that part of the order requiring sureties to be given for the performance of the order to be quashed, and the other part to be confirmed.

3. *Rex v. Swetz*. M. T. 1807. K. B. 9 East 25.

After the usual recitals in an order of filiation made at the quarter sessions, it was stated to have been adjudged by the Court that the said A. B. was the reputed father of the said child, and to have been ordered, as well for the better relief of the said parish of N. as for the sustentation of the said child, that the said A. B. should forthwith, upon notice of the said order, pay, &c. for and towards the lying-in of the said C. D. and the maintenance of the said child to the time of making the said order; and the further sum of — for the costs of the said parish in and about the obtaining of the said order. An objection was now taken to the above order, on the ground that the sessions had no jurisdiction to award the payment of costs. In the course of the argument, Grose, J. stated that he felt a difficulty upon the words of the statute of Eliz. (18 Eliz. c. 3. s. 2.) which directs the justices to "take order as well for the punishment of the mother and the reputed father of the said bastard child, as also for the better relief of every such parish in part, or in all;" and that unless the magistrates had a power of directing the costs of obtaining the order to be paid, so far from the parish being relieved, it might, in some cases, be burthened still more than before. And the learned judge, in pronouncing judgment, adverted to the above view of the case, he had taken during the discussion, recapitulated his arguments, but observed, as Lord Chief Justice Ellenborough, and his brothers, Lawrence and Le Blanc, dissented from him in opinion, it must be presumed that they had put the right construction on the statute. In pronouncing judgment upon the facts, they founded their decisions upon the considerations, that looking to the intention of the legislature, or to the report books, neither of them appeared to militate against the conclusion they had arrived at; for that, in the first place, two mischiefs were recited in the act—the charges of keeping the bastard children, and the evil example of others; for each of which, a particular remedy was given; for the one, by making an order for the charges already incurred by the parish, on account of the child, and for its future maintenance, for the other, by the punishment of the lewd mother and reputed father, so that collecting what relief the legislature intended by the words better relief, by adverting to the mischiefs recited; there was, neither in express terms, nor by fair inference, any power given to the justices to order the costs of obtaining the order to be paid to the defendant; and that, in the second place, even if the words of the act were more doubtful than they were, a strong argument was to be drawn from the report books, being on the one hand almost entirely silent as to an award of costs in such a case as the one before them (although a long period of time had elapsed since the passing of the act;) and on the other hand, where an inference could be drawn from other reported cases, either for or against the doctrine then laid down by them, from its being confirmatory of such position; as in the case of the King v. Moravia, (1 Const. Bott. 437. pl. 596.) where the very ground on which the Court confirmed the order for the payment of a gross sum "for the maintenance of the child, and other incident charges and expences," was, because they consider-

So the sessions have not power to direct the defendant to pay the costs of obtaining the order.

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ed those *incident* charges and expences as confined to charges and expences attending the maintenance of the child; considering that, unless so confined, the order would have been bad. The order in this case was, consequently holden *pro tanto*, but good as to the rest; it appearing that the justices had distinguished how much was given for maintenance, and how much for costs.—See 6 T. R. 148; 1 Const. Bott. 421. pl. 552; 1 Vent. 37; id. 434; pl. 583; 1 Stra. 437.

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And for a non-compliance, the sessions under the 18 Eliz. can only proceed on their recognizance;* but by 3 Car. they may commit.

4. REGINA V. WESTON. E. T. 1704. K. B. 1 Salk. 122. S. C. 2 Lord Raym. 1197. but not S. P.

The defendant, being adjudged, by two justices, the father of a bastard child, he appealed to the sessions where the order was confirmed, and he was committed for not paying the sum ordered. This case coming before the Court, by *habeas corpus*, it was objected that the sessions should have proceeded on his recognizance. But, Holt, J. said, if they proceed on the 18 Eliz. the sessions have no power to commit, but to proceed to his recognizance; though if they proceed under the 3 Car. 1. they may commit, as the two justices might have done; that is, unless the party put in security to perform the order, or to appear at the next sessions.

2, *Of the power of Justices to make such order; and liability of Justices for improperly making.*

1. REX V. JENKYN T. T. 1735. K. B. 2 Stra. 1050; S. C. Ca. Temp. Hard. 302.

The power of justices out of sessions is by 18 Eliz. c. 3 and confers no new power to convict or acquit; and therefore an order made to discharge the supposed father;

An order made by two justices setting forth that the defendant had been charged with being the father of a bastard child, and that on examination into the matter they were of opinion that he was not so, and do therefore adjudge that he be acquitted thereof, being removed into this court, the Court were of opinion, that the justices had gone too far, for their whole authority is under stat. 18 Eliz. c. 3. whereby they are only empowered to take order for the relief of the parish, and the punishment of the offender, but have no power to acquit the party, or convict him finally; which appears likewise from their proceedings being always in English, when they are not required to set out the evidence, or show a summons. The sessions indeed, on statute 3 Car. 1. c. 4. s. 15. may make a final order; and after a man is discharged by one sessions, a subsequent sessions cannot take it up again, as was held Mich. 13 Geo. 1. the King v. Tenant. And it would be greatly inconvenient, that the justices should have such a power, because the parish cannot appeal; the defendant indeed may, not by virtue of the express words, but in consequence of the clause about giving security to abide the order of sessions, if the party does not submit to the order of the two justices. And though a man may thereby be liable to be harrassed in being carried before several justices, that is a less evil than the other; the Court being always open for redress, if any thing should be done to the manifest oppression of the party.—The order was quashed.

Or an order made upon the same cause of bastardy, which had

2. THE KING V. TENANT. M. T. 1726. K. B. 2 Stra. 716; S. C. 2 Lord Raym. 1423.

Upon an order of bastardy, the defendant appealed to the sessions, where upon a full hearing, he was discharged. Afterwards the same justices made a new order upon him. Upon motion to quash it, the Court quashed the last

* Under the 18 Eliz. the justices out of sessions have no authority to require a recognizance, unless the party disobey the order of maintenance; and therefore, where the sessions make an original order of filiation and maintenance, they cannot require a recognizance until such order is disobeyed, in which case the party may be taken up and committed, unless he give security for performance, pursuant to 18 Eliz. c. 3. s. 2.

† From the case of Rex v. Skinn, 1 Bott. 476. it appears that the words in or next unto the limits are only directory, and that an order of maintenance by two justices, not in or next unto the limits where the parish church is, is valid. If, therefore, two justices can not agree in the order, or shall make no order, it should seem in the one case, a justice not being the next, may join with either of the other in making the order; and in the other case, recourse might be had to two other justices, being as near the limits as such could be procured. If the child be born in an extra parochial place, the two justices have no authority, it seems, to make an order of bastardy; 1 Bott. 476.

order, because it was upon defendant to keep the child as the reputed father, and that order being regularly discharged upon appeal, the defendant was legally acquitted, and could not be drawn in question again for the same fact. been discharged at the sessions is bad.

See 1 Vent. 59.

3. *REX v. MILES*. E. T. 1709. K. B. 1 Sess. Ca. 83; S. C. 1 Bott. 473.

On a motion to quash an order of bastardy, it was resolved, that if the father run away and returned, though 14 years after, yet an order to fix the child on him is good, notwithstanding the statute of 13 & 14 Car. 2. c. 12. which gives a power to justices to make an adjudication in his absence, and to charge his effects; for there is no statute of limitations as to these cases, nor is there any instance where justices have been restrained. The order of bastardy may be made at any time after the birth.*

4. *REX v. GIBBS*. M. T. 1687. K. B. Comb. 63.

An order for the maintenance of a bastard was objected to, on the ground that none of the justices were of the quorum. But the Court said, this objection has several times been over-ruled. And is good though the justices be out of the quorum.

5. *THE KING v. HESLOP*. H. T. 1733. K. B. 2 Stra. 974.

An order of bastardy by two justices of the borough of Richmond, in Yorkshire, was quashed for want of one of the quorum, although 3 Car. 1. c. 5. was insisted on, where justices in precincts have power to execute the 18 Eliz. c. 3. as justices in the county do; which the Court said must be in the same manner. But the reporter doubts the tenability of this judgment, as many charters have no quorum. Unless it be made by borough justices.

6. *REX v. COTTON*. T. T. 1732. K. B. 1 Sess. Ca. 219; S. C. 1 Bott. 486. [200]

On motion for an information against the defendant, who, with another justice, made an order of bastardy upon one A. B., without summoning him to appear before them to make his defence, who, upon appeal to the sessions, had been acquitted, and put to great expence, the Court granted a rule to show cause, and after cause shown said, no man in an office can be supposed to be so ignorant as not to know it is against natural justice to convict a man without a summons; the examination ought to be so made, that the truth may appear, and that must be by examining both sides, otherwise it is partial. [200]
Such an order cannot be made without summoning the reputed father.

7. *REX v. TAYLOR*. E. T. 1734. K. B. 2 Sess. Ca. 350; C. Temp. Hard. 112; S. C. but not S. P.

On motion for an information against justices for adjudging A. B. to be the reputed father of a bastard child, without summoning him, it was proved that he had been summoned by a third justice. The Court discharged the rule, on the ground that the objection could not be sustained. Which may be done by a third justice.

8. *REX v. NEAL*. E. T. 1735. K. B. Ca. Temp. Hard. 112; S. C. 2 Sess. Ca. 350.

On motion for an information against the defendant, a justice, for convicting a man of being the father of a bastard child, on the ground that the reputed father was not present, nor previously summoned, and that the justices had not heard his witnesses, it being proved that he had been summoned, the Court said, if the party being summoned will not appear himself, there is no reason the justice should hear any defence made for him;† for if that were allowed, no offender would attend, but would, if he failed to clear himself, run away, and defeat the parish's claim.—Rule refused. And after a summons, though he does not attend, the order will be good.

9. *REX v. MILES*. M. T. 1724. K. B. 10 Mod. 271.

This was a motion to quash an order of bastardy. The objection against the order was, that it awarded that the father shall give security both for the performance of the order, and likewise for indemnifying the parish for the future. *Per Cur.* The giving security is a thing very reasonable in itself; but since there have been former opinions of the Court, that the justices have not a power to award the giving security for the due performance of their order, Unless it directs security to be given for its performance.

* By the 6 Geo. 2. if the reputed father be in prison, and no order be made in six weeks after the birth of the child, he may in such cases be discharged from his imprisonment; but the order, nevertheless, made upon him afterwards will be good.

† But in 1 Stra. 44. it was holden, that the defendant might trust his defence to another, and that the justice could not compel him to appear in person.

until such time as their order has been contemned (but then they have), the order must be quashed for that; but as for giving security for indemnifying the parish, it is right.

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So it is good, though the putative father be not present at the examination of the mother.

10. *REX v. THE INHABITANTS OF UPTON-GRAY*. T. T. 1781. K. B. Cald. 308. Two justices adjudge Walter Nation, of the parish of Froyle, in the county of Southampton, servant, to be the reputed father "of a female bastard child, begotten on Sarah Arundel, and that the said child was chargeable to the parish of Upton-Gray, in the said county; and that he should pay, &c. and also one shilling weekly, &c." The sessions, on appeal, quashed this order, and stated as follows; upon hearing the order, as above stated, read, and what was alleged by counsel thereupon, and it not appearing upon the face of the order, that the said Sarah Arundel was examined in the presence of the said Walter Nation, at the time of making the said order; this Court is of opinion, and doth adjudge, that the said recited order ought to be quashed; and the same is hereby quashed accordingly. *Per Cur.* The presence of the putative father is not necessary before the justices out of the sessions; and as the sessions have stated this, and no other, to have been the foundation of their proceeding, we cannot presume that they went upon any other.—Order of sessions quashed, and original order affirmed.

But no order of filiation, &c. can be made unless the child be born alive.

And an action lies against a justice for committing a man as the father of a bastard when he is not.

11. *REX v. DE BROUQUEAS*. T. T. 1811. K. B. 14 East. 277.

An order of bastardy stated that E. A., a single woman, on the 13th of September, 1810, was delivered of a dead-born male bastard child; and the justices then adjudged, from the facts that appeared, that A. B. was the reputed father, and was consequently liable for certain expences incurred in consequence of the previous motion to quash the order. *Per Cur.* All the provisions in the several statutes assume the birth of a child, which must of course be born alive. No dead substance is the object of legislative provision in any of the acts.—Order quashed. See 18 Eliz. c. 3. s. 2; 13 & 14 Car. 2. c. 12. s. 19; 6 Geo. 2. c. 31. s. 1; and 49 Geo. 3. c. 68. s. 2.

12. *GRINVEL'S CASE*, T. T. 1697. K. B. Comb. 482.

Per Holt, C. J. Where a justice of the peace commits a man as the reputed father of a bastard, and it afterwards appears that it is not so, an action will lie against him.

3. Of the form of such order.

1. *REX v. TAYLOR*. E. T. 1763. K. B. 3 Burr. 1680. more fully abridged *ante*.

An order of bastardy

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may* be made upon the mother only;

Or upon the mother and father, ordering each to pay a proportion.

The order must be made by two justices though it is good if made by more, It need not state that they wer

The defendant being brought up by *habeas corpus*, having been committed for disobeying an order of justices adjudging her child to be a bastard, and ordering her to maintain it by paying, &c. on the ground that she had since married, and could not be committed to prison, was remanded by the Court.

2. *SHORTER v. DAVISON*. M. T. 1693. K. B. Comb. 232. *S. P. REGINA v. COLLINS*. T. T. 1707. K. B. 11 Mod. 178.

An order being made that the father of a bastard child should pay 2s. per week, for seven years, and that the mother should keep it, was holden by the Court to be good and consistent. See 1 Pott. 490. pl. 682; but see 1 Vent. 48.

3. *HATTON'S CASE*. H. T. 1695. K. B. 2 Salk. 477.

An order was made by five justices to maintain a bastard child; and it was objected, that the complaint is not said to be made by any parish or officers there, but only of a town, which may include several parishes; but the Court held that well enough. 2dly, That the order is under the hands of five justices, whereas it should be only under the hands of the two next; but the Court held that well, for the statute is not restrictive to two, but there must be two at least.

4. *REX v. FOX*. T. T. 1789. K. B. cited *REX v. PRICE*. 6 T. R. 148. *Seemle contra. REX v. SEBORNE*. M. T. 1680. K. B. 2 Show. 132.

In this case the order of bastardy was, "the order of us, J. and D., two justices, &c. residing near to the parish of H., concerning a child born in the

* It may contain more bastard children than one, if begotten by the same father upon the same mother; 1 Pott. 270. pl. 587: and must state the authority of the justices. The county, therefore, should be set forth, to show that the fact arose where they have juris-

parish of H.," &c. It was objected that it is not adjudged that this child was born in the parish of H., but only stated so in the title of the order; and that it did not appear that the two justices lived next to the parish church were born, &c. But the Court overruled the objection, observing, that this need not be a part of the adjudication; but if it appear in any part of the order, it is sufficient.

5. *REX v. BUCKALL*. 1 Barnard. 261; S. C. Bott. 482.

It was objected in this case, that the order did not appear to be made upon complaint of the parish. It was answered, that the statute 18 Eliz. c. 3. does not require that the parish should complain, but gives the justices power to make such order on the complaint of any other individual. See 6 T. R. 148; 1 Bott. 478. pl. 588; 2 Bott. 478.

6. *REX v. THE INHABITANTS OF SAINT MARY'S, NOTTINGHAM*. E. T. 1737. K. B. 13 East. 57 n.

An objection was taken to an order of bastardy, on the ground that the complaint did not appear to have been made by the parish where the child was born; but that the contrary rather appeared, for it was stated that she was a casual poor. *Per Cur.* The statute 18 Eliz. c. 3. s. 2. concerning "bastards left to be kept at the charges of the parish where they are born," enacts, "that two justices of the peace in or next unto the limits wherein the parish church is, within which parish such bastard shall be born, upon examination, &c. shall take order as well for the punishment of the mother and reputed father, as also for the better relief of every such parish, &c." An order of bastardy not appearing to be made on complaint of the parish where the child was born; but on the contrary stating that she was a casual poor there is consequently bad; for *non constat* but that she may have been born in a parish in another county, out of the jurisdiction of the justices making the order.†

7. *REX v. THE INHABITANTS OF HARTINGTON*, Upper Quarter. H. T. 1816. K. B. 4 M. & S. 559.

An order of justices, filiating a bastard child, and made on the complaint of the overseers of a township, was objected to on the ground that it did not appear that it was a township which maintained its own poor; and that if it were not, the order could not be made. But the Court held, that the requisite fact appeared by necessary inference; for unless the township maintained its own poor, there could be no overseers. See 1 Bott. 489.

8. *REX v. CLAYTON*. M. T. 1802. K. B. 3 East. 58. S. P. *REX v. CLEG.* M. T. 1721. K. B. 1 Stra. 475; S. C. 8 Mod. 4.

An order of bastardy, reciting that it had appeared to certain justices, on the oath of R. T., that the said Mary Cole (referring to the title, in which she was named as Mary Cole, deceased), was delivered of a bastard child, &c.; and further, that upon the examination of the said M. C. taken on oath, &c., *da'ed*, &c. in the presence of the said R. T., the said M. C., upon her oath, charged the defendant with being the father, &c., adjudged that therefore, upon examination of the cause and circumstances of the premises, as well on the oath of the said M. C. before birth so taken, and also upon the oath of the said R. T., that the defendant was the father, and that he should pay so much, &c. After appeal, confirming the original order, a rule nisi had been obtained to quash the two orders, for insufficiency; 1st, because it is not stated that the defendant was summoned to appear before the magistrates to answer the complaint; and,

2d, because it appears in the margin, that is sufficient; for the reason only why the county should be in the margin, is to show that the fact arose within the justices' jurisdiction; 1 Bott. 491. pl. 638.

* Though it has been said, that an order made without the complaint of the parish officers is not good; Blackerby. 44.

† The reputed father was holden bound to enter into a recognizance to appear at the next sessions, held in the county of Nottingham; although it was urged that this differed from cases where orders are quashed for mere insufficiency of law; for that it did not appear that the justices for that county had any jurisdiction over the man at all; the Court observing that it was the invariable practice to take such recognizance, and that if the justices there had no power over him, it was not to be supposed that they would proceed against him.

[204] 2dly, because the original order was made upon illegal evidence. The counsel, in supporting the rule which now came before the Court, after arguing upon the first point, went on to contend that the material fact of filiation could only appear by the woman's testimony if living, or by her examination, in writing, taken under the statute, if dead ; that it no where appeared that she was dead at the time of the examination on which the order was made ; nor, if dead, that her examination had been so taken in writing, unless by inference from what is stated as to its being *dated*, &c. ; nor if written, that it was proved or read over before the magistrates where the order was made. All that appeared was, that the order was made upon a prior examination of the woman, who, for aught that appeared, was living at the time ; and it rather seemed, if any evidence of it at all were given at the time, it was only the verbal testimony of R. T. *Per Cur.* We must confirm both the orders. Every thing favourable must be intended. The examination of Mary Cole must be taken to be in writing. The words "bearing date" authorize such an inference. The title of the order, besides, describes Mary Cole as *deceased*, which word is, by the words "said Mary Cole," referred to in the body of the order ; nor does it necessarily appear, that only the fact of the *examination* of M. C. was testified by R. T. the witness examined ; for the order goes on, "and further, &c.," by which must be understood, that *it further* appeared to the justices, that upon the examination of the said M. C., taken on oath, &c. in the presence of R. T., she charged the defendant with being the father, &c. Then it is not a strained inference to make that the original examination, from whence this appeared to the justices, was produced and verified upon the oath of R. T. Had these facts been unfounded, they would besides have been disproved at the sessions to which an appeal was made. The want of summons, although not in strict accordance with the precedents, does not invalidate the order.—Both orders confirmed. See 1 East. 632 ; 1 Str. 475 ; S. C. 8 Mod. 4 ; 8 Mod. 309 ; 1 Str. 630 ; 1 Id. Raym. 1405 ; Salk. 181 ; Cald. 179 ; 2 T. R. 666 ; 3 id. 496 ; 5 id. 373 ; 6 Geo. 2. c. 31.

9. *REX v. LUFFE*. II. T. 1807. K. B. 8 East. 193.

And an order of filiation described to have been made as well "upon the oath of the wife as otherwise," is good.

In an order of bastardy it was stated, among other things, as follows : Whereas it appeareth unto us the said justices, as well upon the oath of the said M. T. as otherwise, that the husband hath been beyond the seas, and that she did not see, nor had access to him from the 9th of April, 1804, until the 20th of June last past ; and whereas it hath also appeared unto us the said justices, as well upon the complaint, &c. as upon the oath of the said M. T., that she the said M. T., on or about the 13th day of July now last past, was delivered of a male bastard child in the said parish of B., and that the said male bastard child is likely to become chargeable, &c. we therefore, upon examination of the cause and circumstances of the premises, *as well upon the oath of the said M. T. as otherwise*, do hereby adjudge, &c. This order was returned into this court by *certiorari*, having been previously confirmed by the quarter sessions, to whom an appeal had been made. It was now objected to on the ground that the wife was admitted to prove the non-access of the husband.

[205] *Per Cur.* It has been objected that the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only ; whereas it is laid down in the cases, that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of the non-access. This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband with respect to any matter affecting his interest or character. Exceptions have been, however, ingrafted on such rule in cases of necessity ; and consequently it has been holden, by various judges, allowable to examine a married woman as to the fact of her criminal intercourse with another, such being a fact, in many cases, known alone to the wife and the adulterer ; and therefore in the case before us it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child. And here the order is stated to have been made, not on her evidence only, but "upon the oath

of the said M. T. as otherwise." It is true that it is not said "as otherwise upon oath; but as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has been done in other cases, to say that such other evidence must also be taken to have been given upon oath. Then the rule laid down in *The King v. Bedale*, (2 Str. 941. 1076; Rep. Temp. Hard. 379; and Andr. 9.) applies, that if there were other witnesses besides the wife, and she were competent to prove any part of the case, the Court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence. We may therefore read the adjudicatory part of the order as made; "upon examination, &c. of the premises *upon oath*, as well of the said M. T. as otherwise." Besides, this case comes to us after an appeal from the sessions; and we may presume, that if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order. See Co. Litt. 244. a. & 123. b. to 125. 129. in which the whole doctrine is discussed in the notes; 2 Str. 925; Rep. Temp. Hard. 79; 2 Sess. Cas. 175. and Andr. 10; 1 Wils. 340; and see the case of *Rex v. Clayton*, supra, p. 203.

10. THE KING v. ENGLAND. H. T. 1721. K. B. 1 Stra. 503.

In this case two orders of bastardy were returned; one made by two justices, and another original order made at the sessions; the Court quashed them both; the first because neither the sex of the bastard or the name were mentioned; and the last, because there being an order of two justices before, the sessions had no jurisdiction but on appeal. See Doug. 632; 1 Stra. 475.

11. *REX v. CHILDERS*. E. T. 1729. K. B. Cited 1 Dick Just. 211.

On a rule to show cause why an order of two justices for relief of a bastard child, and an order of session confirming the same, should not be quashed, it was objected, that it was not directly adjudged that the child was born in the particular parish; and yet the order requires the defendant to pay the sum of 45s. to the parishioners of that parish; and the Court said, they do not allow of inference to give the justices jurisdiction, and quashed the order.

12. *REX v. SWEET*. M. T. 1807. K. B. 9 East. 25.

An order of bastardy, drawn up in the usual terms, that "whereas it appears to, &c. as well on the complaint of, &c. as on the oath of A. B. &c., that she the said A. B. on, &c. was delivered of a bastard child in the said parish of N.," was objected to on the ground that there was no sufficient adjudication of the birth of the bastard child in the parish of N., but only a recital of that fact. But Lord Ellenborough, C. J. said, the objection made is, that there is no adjudication of the parish where the child was born; but when the order states, that "whereas it appears to the justices, on the oath of the mother, that she was delivered of the child in the parish of N.," we must understand it as an affirmative proposition by the justices, that the fact was sworn to by the mother before them, and that they find it to be true, for they proceed upon that ground to adjudicate that the defendant is the reputed father, and that, for the better relief of that parish, he shall pay such and such sums; and by the statute giving relief in this case, the reputed father is only bound to pay such relief to the parish in which the bastard child is born; and there is no case where an order in this form has ever been held to be bad.

13. *REX v. GODFREY*. E. T. 1723. K. P. 2 Lord Raym. 1363; S. C. Sess. Ca. 292.

An order made on the defendant to maintain a bastard child was quashed, because though in the complaint it was alleged the child was born in the parish of Hitchin, in Hertfordshire, yet there was no adjudication by the justices, nor in the words of the justices from whence it could be collected in what parish the child was born. And a case was cited; the *Queen v. Peddington*, E. T. 10 Ann. where such an order was quashed for this very exception.

14. *REX v. STANLEY*. E. T. 1748. K. B. Cald. 172; S. C. 1 Bott. 504.

Two justices of the West Riding of the county of York, by an order dated, &c. adjudged Thomas Stanley, of Worksop, in the county of Nottingham, to

But an order of bastardy ought to mention the name or sex of the bastard.

[206] And it must appear that the child was born

in the parish for whose relief the order is made.

But a recital in an order of

bastardy, that

"whereas it appears to the justices on the

oath of the mother,

that she was delivered of

the child in the parish of

N." is a sufficient

positive indication

of the birth of the child in that parish.

Although an allegation in the complaint

from whence the place of its birth can be collected

[207] be the reputed father of a bastard child, begotten upon Ann Storey, of Anston, in the said West Riding, *which said child is now become chargeable, &c., and is likely so to continue*, and then proceeded to order maintenance, &c. It was objected that there was no adjudication that the child was born in the parish charged with its maintenance, nothing more being stated than that it was chargeable to the parish, and likely so to continue; it was holden insufficient, and therefore quashed.

15. *REX v. BUTCHER*. T. T. 1720. K. B. 1 Stra. 437.

An order of bastardy was objected to, because it did not appear that the child was born in the parish to which the relief was ordered; it ran thus, "we A. and B. two justices of the borough of Lime Regis, residing within the limits where the parish church is, within which parish the child was born, do, &c." which is only an averment; it was contended that the justices resided in that parish where the child was born; but that might not be the same parish to which relief is given; and of that opinion was the Court, and quashed the order.

16. *ANON. E. T.* 1712. K. B. 10 Mod. Rep. 85.

In this case an exception was taken to an order of justices made for the maintenance of a bastard child, that it was not set forth in the order that it was likely to become chargeable to the parish, which is the very foundation of the jurisdiction of justices of the peace. But the Court said, the objection is of no weight, for the law presumes that bastard children will become chargeable because nobody is bound to provide for them, and therefore this need not appear on the order.

17. *RODNEY v. STROUD*. M. T. 1686. K. T. Comb. 39.

It was objected to an order for the maintenance of a bastard, that it did not state that the child was chargeable to the parish, or likely to become so. It was holden bad, and quashed. See 1 Vent. 357.

18. *REX v. THE INHABITANTS OF HARTINGTON*. H. T. 1816. K. B. 4 M. & S. 559.

By an order of two justices made upon the complaint of the overseers of the poor of the township of Hartington in the county of Derby, reciting that it appeared upon the examination of M. L. upon oath, and upon other due proof, &c. that the said M. L. was on the 7th of May delivered of a bastard child in the said township, and that the said child is likely to become chargeable to the inhabitants of the said township, &c. the justices adjudged the same to be true, and that W. B. was the reputed father, and ordered, &c. Because this order did not state that the child was "actually chargeable." the justices of the session quashed the order, subject to the opinion of the Court of King's Bench. It was insisted in support of the order of session, that 18 Eliz. only concerns bastards who are actually chargeable. To this objection two cases, (*Rex v. Luffe*. 8 East. 193, *et infra*; *Rex v. Mathews*, 1 Salk. 476.) were cited in answer, which were held sufficient by the Court.

19. *REX v. LUFFE*. H. T. 1807. K. P. 8 East. 193.

An order of bastardy filiating the child of a married woman, which stated that the order was made, it appearing to the justices that the child was likely to become chargeable, &c. was objected to on the ground that this being the child of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually chargeable, and not merely to become so; inasmuch as the stat. 6 Geo. 2. c. 31. s. 1. which gave jurisdiction to magistrates to make examination for making orders of filiation, in case of bastards likely to become chargeable, was confined in terms to the

* So where the order was made on the parish officers to maintain it until the mother should be able to provide for it, the mother not being able to keep it, the father unknown, and the child likely to perish, it was quashed, because it did not appear that the child was born there; 1 Bott. 489. pl. 630.

† But an order which recited that the child was baptized in the parish, and did not adjudge that it was born there, was confirmed; 1 Bott. 42. pl. 636. So where it was objected to an order that it was no otherwise affirmed that the child was born in G., than by a *whenceas*, which if a recital only, it was holden sufficient; 1 Bott. 491. pl. 635.

Or of a married woman, was holden good, though it only state that such child was likely to become chargeable, &c.

bastards of single women. It was, however, urged, that the order would be good on the general statute of the 18th Eliz. c. 3. which gave the magistrates jurisdiction to filiate bastards "begotten and born out of lawful matrimony."

Per Cur. It seems that a child born by adulterous intercourse is as much within the provision of the act of Geo. 2. as one which is born of a single woman. For when the question is whether this were a child born out of lawful matrimony, that is, out of the limits and rights belonging to the state, it is the same in substance as the question which arises in instances coming within the express words of the act of Geo. 2. namely, whether it be a bastard. It is for the general purposes of the act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to this subject) a bastard. The cases of *Rex v. Reading*, Rep. Temp. Hard. 79. 2 Sess. Cas. 175; And. 10; and *Rex v. Bedall*, 2 Str. 991; were both after the statute of Geo. 2. and yet no such objection was taken.—Order confirmed.

See 1 Salk. 122; 2 id. 483; 1 Lord Raym. 398; Carth. 469; 3 Burr. 1679; 1 Vent. 37.

20. *REX v. BAKER*. Cited. 1 Const. 476. pl. 626.

In this case the order was entitled thus, "The order of us, A. B. and C. D. justices, &c. concerning a bastard child born in the foreign of Ryegate, in the parish of Ryegate, and chargeable thereto, of which the churchwardens and overseers of the foreign of Ryegate have made complaint. It was objected that it was an *extra parochial place*, for it appears that the child was born in the foreign of Ryegate. Answer, it is alleged to be within the parish, the foreign of Ryegate is the parish of Ryegate. But the order was quashed upon this and another exception."

The parish or extra parochial place, must be as curately stated.

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21. *REX v. PITTS*. E. T. 1770. K. B. 2 Doug. 662.

On a rule to show cause why an order of bastardy made upon the defendant by two justices for the county of Horeford, and confirmed by the court of quarter sessions for that county, should not be quashed, the objection was, that the order contained no express adjudication, and was, therefore, void, according to the case of *Rex v. Perkasse*, 2 Sid. 363. *Willes, J.* upon the cases of *Rex v. Perkasse*, and *Suddlecombe v. Burwash*, 1 Salk. 491. being quoted, declared the judgment of the court as follows. the case of *St. Giles, Cripplegate, v. Hackney*, 1 Salk. 478. seems to be more like the present, than *Suddlecombe v. Burwash*. In that last case, the report concludes by saying, "there ought to be a particuler averment, &c." and in *St. Giles, Cripplegate, v. Hackney*, the order runs very much in the same manner as here, viz. "Whereas, on oath made, by the said E. E. it appears, that her husband was legally settled at Hackney;" and that order was quashed, "because there was no judgment of the justices concerning the last legal settlement, but only on the oath of a woman." "We have looked into the proceedings in *Rex v. Gravesend*, Bot. 437. and we find, that there was an express adjudication in that case. We are, therefore, all of opinion, that this order cannot be supported. Both the orders quashed.

And the party must be adjudged to be the reputed father of the bastard.

22. *REGINA v. WESTON*. T. T. 1704. K. B. 2 Ld. Raym. 1197.

The defendant was adjudged by two justices of the peace to be the father of a bastard child; and the order being removed into this court by *certiorari* it was objected to, on the ground that after the recital of the order, when it came to the adjudication, it was, we the said justices doth adjudge, instead of do, the singular number for the plural. And to maintain this objection, *Fulwood's* case, 1 Cro. 489. was cited, where F. and others were indicted on stat. 3 H. 7. c. 2. for assaulting and taking away a woman by force, and marrying her against her will; and the indictment was *cepit* instead of *ceperunt* and not

By two justices; therefore, in adjudication, in the singular number is void;

* For in *Rex v. Mitford*, 1 Bott. 439. pl. 627. an order was quashed, because it was not stated that the child was shargeable to the parish but to the hamlet. But if it had been an hamlet which maintained its own poor, it would have been good. So in *Rex v. Howlett*, 1 Bott. 491. pl. 634; 8. C. 1 Wils. 55. not S, P; where the order directed the father to maintain the child for the relief of the governor and guardian for the poor of Colchester, and not saying for the relief of the poor, it was quashed on that ground.

withstanding that exception taken, yet judgment of death was given against the defendants. Put *Holt, C. J.* said, that the answer which is reported in the book to have been given to the objection, is not adequate to it, and is so very odd, that he feared the reporter was mistaken, and ordered the roll to be searched; and on searching, the roll was produced in Court, and was not correct, as it was reported to be in the book, but *ceperunt*; and so that case being removed out of the way, after the matter had depended two terms, the Court for that exception quashed the order.

23. *REX v. BROWNE*. T. T. 1738. K. B. 2 Stra. 811.

[210] On an order of bastardy, it was stated, that the husband had been absent six years,* and that during his absence the defendant had carnal knowledge of his wife, and therefore they adjudged him to be the putative father. *Per Cur.* That order must be quashed, for his lying with her is not a sufficient reason to infer him the father of this child; and though the justices need not show the grounds they go on, yet if they do, and it appears not sufficient ground their order will be bad.

It may direct the payment to be made to the overseers on a particular day in the week.†
24. *REGINA v. WESTON*. T. T. 1704. K. B. 1 Ld. Raym. 1197.
The defendant was adjudged by two justices of the peace, to be the father of a bastard child, and the order being removed into this court by *certiorari*, several exceptions were taken to it;

1st, That the justices had ordered the weekly payments to be made on a particular day, viz. on every Monday, in which they had gone beyond the power given them by the statute; for computing the time from the making the order the week was not up on the Monday.

Holt, C. J. held that it was well; and if it was before the day the week was up, yet payment before the day was payment at the day; and 2dly, That the money was ordered to be paid to the overseers of the poor, whereas it ought to have been ordered to be paid to the inhabitants of the parish generally. *Holt, C. J.* held it was well enough.

25. *REGINA v. ODAM*. M. T. 1712. K. K. 1 Salk. 124.

Of a sum in gross,‡ and afterwards so much per week.
An order for maintenance of a bastard child was excepted to, because the defendant was on sight of the order to pay 9l. in gross, and after that so much weekly. *Per Cur.* By the statute the justices are to take order for the relief of the parish, and keeping of the child, by payment of money weekly, or other sustentation; and this may be only indemnifying the parish for money laid out before the reputed father was found. But see *Rex v. Colbert*, Comb. 103. & 26. *REX v. THE INHABITANTS OF HARTINGTON*. H. T. 1816. K. B. 4 M. S. 559.

And it is not necessary in the order to state that the sum directed to be paid for the lying-in has been actually expended.§
An order of filiation in bastardy stated that the child was likely to become chargeable to the township; and awarded that the putative father should pay a certain gross sum towards the lying-in expenses and maintenance of the child up to the time of making the order, and from thenceforth so much weekly. It was objected that it was not alleged that the gross sum had been expended or was a necessary sum. But the Court said, that supposing such objection to be valid, it would only operate against order *pro tanto*, leaving that part which directed future weekly payments unimpeached. See 1 Bott. 493. pl. 638; but see 1 Vent 210.

* But an order of justices for the maintenance of a *bastard child*, of a *married woman*, must show that the husband had no access for the space of forty weeks antecedent to the birth, for it is not sufficient only to say that the husband was *beyond the seas*; 5 Mod. 419: *Holt*, 507; *Carth.* 469; *Ld. Raym.* 395; 1 Salk. 483:

† And if no day be stated, it is payable at the commencement of the week; 1 T. R. 316.

‡ And if it directs a certain sum to be paid towards the expenses of the parish on account of the child, it will be good, though it do not particularize what the expenses were; 1 Bott. 470. pl. 587. So an order for a sum in gross, for maintenance and other incidental expenses, is sufficient. 1 Bott. 491. pl. 635. and 492. pl. 633. But if it had only stated it to be for maintenance, it would have been too general; *ibid*.

§ Nor need it state by whom the money is disbursed; 1 Bott. 487. pl. 618.

27. *REX v. PERKASSE*. E. T. 1667. K. B. 1 Sid. 363.

On motion to quash an order for the maintenance of a bastard child, on the ground that it directed two shillings a week to be paid, which is unreasonably small, the Court were of the same opinion, and ordered the same to be quashed.

[211]
The sum directed to be paid must not be unreasonably small;

28. *SHERMAN'S CASE*. 1671 K. B. 1 Vent. 210.

An order of bastardy being removed into this Court, it was excepted to, because it directed seven shillings a week to be paid for the nursing, clothing, &c. And the court said, the allowance was unreasonable. Besides, it directs the payment to be made until the child is able to work; how can that be sustained? The father may take the child and keep it himself.

Nor excessively large;

29. *REX v. MATTHEWS*. H. T. 1695. K. B. 2 Salk. 475.

It was moved to quash an order for the maintenance of a bastard child, because the defendant was ordered to pay 1s. 6d. per week indefinitely; the Court granted a rule to show cause, which was afterwards made absolute.

And must not be to pay so much per week indefinitely;

30. *REX v. SMITH*. E. T. 1711. K. B. 1 Bott. 479. *S. P. NEWLAND v. OS- MAN*. T. T. 1753. 1 Bott. 460. pl. 574.

To this order of bastardy it was objected that it ought to be to pay so much, &c. during so long as the child is chargeable. And the Court said that was the most usual and correct form.

But ought to be, during so long a time as the child shall be chargeable;

REX v. JOHNSON. M. T. 1687. K. B. Comb. 69.

In this case an exception was taken to an order for the maintenance of a bastard, viz. that it made provision for the maintenance of the bastard till he became not chargeable, &c. when by the statute it should have been till the bastard was able to procure his own livelihood; but the court held the objection untenable, and confirmed the order. See Sid. 222.

Or till it shall be no longer chargeable.

32. *REX v. SMITH*. E. T. 1711. K. B. 1 Bott. 479.

Order to pay 1s. a week till the child is eight years old, was objected to because he might gain a settlement, or a person might give him an estate or the father might take him home. But the court said, that is only a remote possibility. As to the father's taking him, he ought to have done it at first; and by suffering the order to be made, it shall be deemed a refusal in law; besides, he shall not then be suffered to have him.

And orders directing the payment till the child is 8 years old;

33. *THE KING v. STREET*. M. T. 1727. K. B. 2. Stra. 788.

An order of bastardy was made to pay so much weekly, till the child was nine years old, if it should live so long.

[212]
Or 9 years old if it should so long live;

34. *REX v. BUCKALL*. K. B. 1 Barn. 261.

Exception was taken that the order appointed the sum of 2s. to be paid weekly, till the child should come to the age of 12 years, without saying if it should be so long chargeable to the parish. It was answered, that indeed the old authorities lay it down in general that, orders of bastardy, as well as other orders relating to the poor, must be under the limitation mentioned; but the latter authorities have been, that orders of bastardy need not; and this it was said, is founded upon good reason, for there cannot be any reasonable intendment that bastards who have no kindred, will have provisions from any body till such an age as is mentioned in the order. And of that opinion was the Court, and confirmed the order.

Or till 12 years, are good.

35. *THE KING v. BAREBAKER*. H. T. 1693. K. B. 1 Salk. 121; S. C. 1 Sid. 222.

An order of justices was to pay so much per week, till the child was fourteen years of age; the court held it nought; for they have no power but to indemnify the parish, and that is merely to oblige the father to maintain the bastard as long as it is or may be chargeable to them.

But orders to pay till the child is 14 years old;

36. *REX v. BROWN*. T. T. 1696. K. B. 2 Salk. 480.

This order of bastardy adjudged that the reputed father should pay a certain weekly sum till the child be seven years of age. But the Court said they can-

Or 7 years old absolutely;

* So it is good if it directs 4s a week to be paid during so long as the two female bastards shall be chargeable, without specifying how much for each; for if either die, the party is discharged; 1 Bott. 470. pl. 587.

Or 'till further orders are bad.

[213] So it is bad if it directs a sum to be paid for putting the child out as an apprentice.*

Or if it awards so much for costs, &c. as should be considered reasonable by A. B. it cannot be supported.

The notice of appeal against such an order under the 49 Geo. 3.† must be given ten clear days before the sessions; And show the cause and matter of the appeal:

not charge the father to pay for any certain time, but it must be as long as the child shall be chargeable.

37. *THE KING v. THOMAS*. M. T. 1680. K. B. 2 Show. 130.

On motion to quash an order of sessions, which stated that the father of a bastard child should pay a certain sum per week "till further order;" it was contended that the justices had no power to make such an order for "further order," as it may mean twenty years hence; though on the child's death, or attaining the age of 27 years, the reputed father is discharged. in which the Court agreed and quashed the order.

38. *THE QUEEN v. ATKINS*. E. T. 1707. K. B. 11 Mod. Rep. 172.

The justices after ordering the defendant to pay so much per week for a bastard, till it should be of such an age, directed him to expend 5*l.* to put it out as an apprentice; it was contended that the order could not be supported; in which the Court concurred, and it was quashed.

See 1 Salk. 478; 2 Stra. 788; Comb. 69.

39. *REX v. ST. MARY'S, NOTTINGHAM*. E. T. 1737. K. B. 13 East. 57. n.

An order of bastardy made by the sessions of Nottingham was holden bad, because the sessions had given the parish so much for charges and expences as should be adjudged to be reasonable by A. B. and C. D. on the ground that the sessions could not delegate their authorities.

4. *Of appealing again such order*

1. *REX v. THE JUSTICES OF HEREFORDSHIRE*. E. T. 1820. K. B. 3 B. & A. 581.

A. B. having been adjudged the father of a bastard child, gave notice of appeal against the order, on the 9th of October; and the sessions being holden on the 19th of the same month, they refused to hear the appeal, holding the notice defective under the 49 Geo. 3., which requires notice to be given 10 days clear before the sessions. And of that opinion was this Court, who said the notice must be given 10 clear days, that is, 10 perfect intervening days between the notice and the first day of the sessions.

2. *REX v. THE JUSTICES OF OXFORDSHIRE*. H. T. 1823. K. B. 1 B. & C. 279.

One I. H. N. having been adjudged the father of a bastard child, appealed against the order of filiation, and gave the following notice. This is to give you notice, that I H. N. of L., do intend at the next general quarter sessions, &c. to commence and prosecute an appeal against an order of filiation made by you,

* And if it direct security to be given for its performance, it is bad; 1 Bott. 472.

† By the aforesaid stat. of the 18 Eliz. c. 8. "the mother, or reputed father, refusing to perform the order of the two justices, shall be committed, unless they shall put sufficient surety to perform the said order, or else personally to appear at the next general session of the peace to be holden in that county where such order shall be taken; and also to abide such order as the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any;) and that if at the said session the said justices shall take no other order, then to abide and perform the order before made, as is above said."

By 49 Geo. 3. c. 68. s. 5. it is enacted, "that any person thinking himself aggrieved by any order made by such justices under the provisions of this act, and not originating in the quarter sessions, may appeal to the next general quarter sessions of the peace to be holden for the county where such order shall be made, on giving notice to such justices, or to one of them, and also to the churchwardens and overseers of the poor of the parish, on whose behalf such order shall have been made, or to one of them, ten clear days before such general quarter sessions of the peace at which such appeal shall be made, of his intention of bringing such appeal, and of the cause and matter thereof, and entering into a recognizance within three days after such notice, before some justice of the peace for such county, with sufficient surety conditioned to try such appeal, and abide the judgment and order of, and pay such costs as shall be awarded by, the justices at such quarter session; which justices, at their said session, upon proof of such notice being given, and of entering into such recognizance as aforesaid, shall, and they are hereby required to proceed in, hear, and determine, the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing or appealed against, as they in their discretion shall judge proper; and such judgments and orders therein made shall be final, binding and conclusive, to all parties concerned, and to all intents and purposes whatsoever."

By sect. 7. "no appeal in any case relating to bastardy shall be brought, received or heard, at the said quarter session, unless such notice shall have been given, and such recognizance shall have been entered into in the manner aforesaid."

&c. whereby I was adjudged to be the father of a female bastard child, born on the body of E. R., and chargeable on the parish of S., in the said county." On an objection that it did not specify the causes and matters of the appeal, pursuant to 49 Geo. 3. the sessions on that ground refused to hear the appeal; and on application to this Court for a *mandamus* to compel them to hear the same, the Court said, the sessions had acted rightly in refusing to hear the appeal, as the notice did not contain any information of the cause and matter of appeal; it merely being a description of the order, and not of the objections which the party charged intended to make to it. [214]

3. *REX v. THE JUSTICES OF SALOP.* T. T. 1821. K. B. 4 B. & A. 626.

An order of filiation having been made against one J. O., under the 49 Geo. 3., he, upon entering into the recognizance, gave a parol notice to the justices who made the order, of his intention to appeal against it, and of the cause and matter of such appeal. When the appeal was called on at the sessions, it was objected that no notice had been given; and the sessions refused to allow the parol notice to be proved, and therefore dismissed the appeal. On an application for a *mandamus* to command them to hear the appeal, the Court said, as the 49 Geo. 3. did not expressly require the notice of appeal to be in writing, a parol notice to the justices of the cause and matter thereof was sufficient. Rule absolute. And need not be in writing.

4. *REX v. MATTHEWS.* H. T. 1695. K. B. 2 Salk. 476. *REX v. GIBSON.* H. T. 1760. C. P. 1 Blac. 198. S. P.

This was a motion to quash an order for maintaining a bastard child. It was now objected to, because no order relating to a bastard child can be quashed, except the reputed father be present in court. The Court granted a rule to show cause. Bnt on showing cause, the Court said they could not quash it till the reputed father came into Court. Upon motion to quash an order of bastardy, the reputed father must be present in court.

5. *SHAW'S CASE.* T. T. 1698. K. B. Carth. 455. *S. P. BROWN'S CASE.* T. T. 1697. K. B. Comb. 448. *S. P. REX v. BURRELL.* M. T. 1647. K. B. 1 Mod. 20; S. C. 1 Vent. 48; S. C. 2 Keb. 515. [215]

Two justices adjudged Shaw to be the reputed father of a bastard child, and by their order charged him to maintain it; from which order he appealed to the next quarter sessions, after notice, where, upon debate, their order was vacated. Thereupon it was moved to quash the order of sessions, on the ground that it recited the order of the justices, and Shaw's appeal, to be to the next general quarter sessions; whereas the 18 Eliz. c. 3. which gives the appeal, directs that it shall be to the next general sessions, and probably there might have been general sessions held for this county between the time of notice of this order and the general quarter sessions when this order was made; and if so, then this appeal was irregular, and the quarter sessions had no jurisdiction; in which the Court agreed, and quashed the order. And the appeal must be to the next general sessions after notice of such order;

6. *REX v. COYSTON.* T. T. 1662. K. B. 1 Sid. 149; S. C. 1 Bott. 504.

On the question to what sessions such appeal shall be taken, it was resolved that this shall be intended of the next session of that part of the county where it was made, and not at the next sessions in any county at large; for that would be mischievous in many counties, where there are several sessions in distinct parts of the county. Holden in that part of the county where the order was made;

7. *REX v. TENANT.* M. T. 1726. K. B. 2 Lord Raym. 1423; S. C. 2 Stra. 716; S. C. 1 Bott. 511.

Several orders of bastardy were removed into this court by *certiorari*; the first order was made by two justices of the peace for the West Riding of Yorkshire, on the defendant to keep a bastard child, as being the reputed father. From this order the defendant appealed to the quarter sessions; and the justices at the quarter sessions, on a full hearing of the merits, discharged the order of the two justices; but bound the defendant by recognizance to appear at the next quarter sessions, as it was supposed, under apprehension that better evidence might be procured against him. After this, the same two justices made a new order against him for keeping this bastard child; and all these orders being removed into this court, November 10, 1726, the Court quashed Where decision is final, whether the order be quashed,

the last order of the two justices; for they having made an order on the defendant to keep the child as reputed father, and that order being regularly discharged on an appeal, on hearing the merits, the defendant was legally acquitted, and cannot be drawn in question again for the same fact.

8. PRIDGEOON'S CASE. II. T. 1633. K. B. Cro. Car. 350.

Or confirm- [216] Two justices made an order of bastardy, and the party appealed to the next sessions, who, upon the merits, confirmed the order; he appealed to another sessions, who made a second order. But the Court held it absolutely void, on the ground that the first appeal was final. See 1 Sess. Ca. 234; 1 Bott. 509.

Since an appeal is the only remedy.

9. GROINVELT V. EURWELL. E. T. 1698. K. B. 1 Lord Raym. 471.

Per Holt, C. J. Where two justices hold a man to be the father of a bastard, he is concluded by the judgment, and cannot falsify it; his only remedy is by appeal.

10. *Ex parte* ADDIS. M. T. 1822. K. B. 1 B. & C. 87; S. C. 2 D. & R. 167.

But where the time for appealing against an order of filiation under the 18 Eliz. had expired, it was held that the justices proceed by committing the offender for 3 months under the 49 Geo. 3. An order of filiation was made by two justices, and directed several sums to be paid. In default of paying these sums, Addis was committed to the county gaol "until those sums should be paid, or until he should be otherwise delivered by due course of law." No appeal was entered against the order of the filiation; and the sessions, thinking the commitment illegal on the face of it, discharged Addis; and a subsequent commitment was made under the same statute, 18 Eliz. 3. reciting the order of filiation. No appeal was then entered against the order; but the sessions refused to interfere. On the case coming before this Court, the judges said, where an order of filiation was not appealed against under the 18 Eliz. within the time prescribed to enforce an order of filiation, the proceedings must be under the 49 Geo. 3. and therefore the commitment could only be for *three months*.

11. REX V. KNILL. H. T. 1810. K. B. 12 East. 50.

Upon the removal of an order of filiation of a bastard child, and an order of sessions confirming it, by *certiorari*, into this court, it was holden to be the bounden duty of the respondents, on an appeal to the sessions, to begin by supporting their order, previous to the appellants being obliged to allege or prove a sufficient cause for invalidating the grounds upon which it might have been made. See 4 T. R. 475.

On an appeal against an order of filiation, the respondents must proceed to support their order, before the other side can be call [217] ed upon to refute it.

5. *Of removing such order into the King's Bench, in order to be quashed.*

1. REX V. STANLEY. E. T. 1748. K. B. Cald. 172; 1 Bott. 504.

Two justices of the West Riding of the county of York, by an order dated the 29th of May, 1781, adjudge Thomas Stanley, of Worksop, in the county of Nottingham, to be the reputed father of a bastard child, begotten upon Ann Storey, of Anston, in the said West Riding; "which said child is now become chargeable, &c. and is likely so to continue;" and then proceed to order maintenance, &c. This order was served upon the defendant on the 31st of June. The next sessions were at Midsummer, on the 11th of July. Upon an appeal to this order at the Michaelmas sessions, holden by adjournment, on the 10th of October, that Court dismissed the appeal, upon the ground of its not having been made at the sessions next after the service of the order. In the ensuing Michaelmas term, a *certiorari* issued, directed to the keepers of the peace and justices for the said West Riding, to remove all orders upon this subject made by the said justices. Upon the return of these orders, a rule was obtained to show cause why the order of sessions made on the 10th of October, 1781, should not be quashed. It was objected, that the defendant could not, under this rule, go into the original order; the order of sessions, which alone was moved to be quashed, having only dismissed the appeal, and not confirmed the original order.

If the defendant be at large, he may by *certiorari* remove the order of justices into the K. B. although there has been no previous appeal to the sessions

Butler, J. Though there may be a slight impropriety in the form, if in effect the order of sessions confirms the original order, the motion to quash the

* But if order be quashed for want of *form*, it is no order at all, and therefore the justices may proceed *de novo*; or the sessions may, under the 5 Geo. 2. c. 19. amend the order in point of form, and proceed upon the merits.

Order of sessions is well enough. Cause was now shown against this rule; and where or it was urged, that till something to raise a contrary presumption was shown, ders which the intendment of the Court was always in favour of the acts of inferior juris- have de- diction; that the order of sessions in the present instance not being objected to, fects on the as defective in point of form, and not being special, but simply dismissing the face of the appeal against the original order of two justices, could not be quashed; that be quash- there having in point of law been no appeal, there ought not to have been any ed.* order whatsoever made at the sessions; and that if any objection was made to the original order, the *certiorari* ought to have been directed to the two justices to have returned it. And he contended, that if the other side should, as had been intimated, move to amend, by making it a rule to show cause why the order of two justices, which had been appealed against, should not be quashed, or should move an original rule to quash that order. that in either way, and however shaped and pointed against such order, the application must now be out of time; as the statute 13 Geo. 2. c. 18, s. 5. requires that "the *certiorari* be applied for in six calendar months next after proceedings shall be had;" that it had been determined in the case of *Rex v. Parker*. that these six months are to be computed from the service of the order, which in the present instance was before the Midsummer sessions; and that the defendant having neglected to appeal in time at the proper place, could not come *per saltum*, and avail himself of an objection in this Court. The Court seemed to think, that if the defendant had meant to take exceptions to the original order, he should have done it by appeal in due time to the sessions; as they could give relief as well upon the form as upon the merits; and that having declined the bringing of his case before the proper jurisdiction in the first instance, he ought not now to be assisted by the Court *per saltum*; but they gave time to look for authorities to justify such an interference. A few days afterwards. the counsel against the rule admitted that the order might be brought up by *certiorari*, without any appeal having been previously lodged at the sessions within time; and he stated the general rule as laid down in 1 Salk. 147. that no *certiorari* shall be granted to remove orders of justices before the determination on appeal to the sessions, unless the time of appeal be expired; because it otherwise hinders the privilege of appealing; consequently, that the Court had a general authority to interfere; that the present case, in which the defendant had declined an appeal within the period prescribed by law, was not within the exception. He also said that this rule was further explained in the case of the borough of Warwick, 1 Strange. 991. which adjudged that it was only in cases wherein the time of appeal was limited, and where it was not left open at any time, that this general authority of the Court was abridged. He added, that as the *certiorari* appeared to have been moved in time, he should not press the Court upon the form of the present rule, and, without a reasonable prospect of success, put the party to the expence of another. *Per Cur.* The original order of adjudication of two justices must be quashed, and the order of sessions, dismissing the order of adjudication affirmed.

2. *Rex v. Bowen*. H. T. 1793. K. B. 5 T. R. 156; S. C. Nol. Rep. 186.

The defendant having been committed upon the oath of A. B., with getting her with child, which was likely to become chargeable to the parish, was committed to prison for refusing to give security to indemnify the said parish. The next quarter sessions, on motion, ordered him to be kept in prison until he should give such indemnity. The order being moved into this court by *certio-*

* As where there is no adjudication that the defendant is the father; *Rex v. Pitts*, Doug. 662. abridged ante 209. So if it appears that the persons making the order had no jurisdiction; *Rex v. Tenant*, 2 Stra. 716. abridged ante 215; or if the justices set forth insufficient reasons for the adjudication, the orders will be quashed; *Rex v. Browne*, 2 Stra. 811. abridged ante 209. But where the order is defective only in one point, so that the remainder may subsist as good by itself, they will quash it as to the defective part, and confirm it as to the valid part; Comb. 264; *Rex v. Skinn*, 1 Bott. 470. pl. 487. And when the case comes on to be argued, the defendant must be present, in court; *Rex v. Matthews*, 2 Salk. 475. abridged ante 214; see also Comb. 418; 1 Blac. Rep. 198, 6 T. R. 147; 15 East. 57.

But if he is in custody the order must be removed by *habeas corpus*.

An order that a parish shall maintain a bastard does not determine that that is the bastard's settlement.

Where the putative father of a bastard was committed by a magistrate for disobedience, to an order, of filiation, "until he should pay the sum due and legal accostomed fees, or until he should be otherwise delivered by due course of law," held that the warrant was illegal.

Although power is only given to two magistrates to commit the mother of a bastard child, for not filiating the child, yet, nevertheless, if one magistrate commit, and an action be commenced against him, notice

rari, the Court said, before we give any opinion upon the merits (stated in a penal case,) we protest that no *certiorari* ought to have been granted to remove this order. It is an imprisonment, and we know of no instance of such an order being removed by *certiorari*. The proper method would have been by an *habeas corpus*, where the facts upon which the commitment was made being disclosed upon the return, the Court could judge whether it was illegal or not.

6. *Of the effect of such order being made, and proceedings to enforce.*

See also *div. ante*, Of appealing against such order.

1. THE PARISH OF BUDWORTH v. THE TOWNSHIP OF DUMPLY. H. T. 1705. K. B. 1 Salk. 123; S. C. 1 Sett. & Rem. 157.

On an order made 30 years ago on the parish of Budworth, for the maintenance of a bastard child, born in the township of Nether Dumbley, within that parish, being now removed before the Court by *certiorari*, it was held, 1st. That an order made on the overseers of any parish, by two justices, for raising a sum towards the maintenance of a bastard or poor person, does not determine the settlement of that person in that parish, for the right of settlement is not contested, but presumed. 2dly, That the clause in statute 13 & 14 Car. 2. c. 12. which provides, that distinct townships of large parishes in the northern counties shall respectively provide for the poor, under the penalty mentioned in stat. 43 Eliz. c. 2. must be understood with respect to the maintenance of poor and impotent persons, and not with respect to bastards who are provided for by other statutes; but if a bastard be grown up, and by accident grows impotent, he may be relieved as a poor person within that statute.

ROBSON v. SPEARMAN. E. T. 1820. K. B. 3 B. & A. 493.

Motion to enter a nonsuit in an action for false imprisonment. The facts of the case so far as relate to the point now abridged, were, that the plaintiff, against whom a regular order of filiation had been previously made, had been committed by warrant of the defendant, a magistrate, for not having paid the arrears due upon that order. The warrant being produced, the commitment was in these words; "To the gaol of M. until he should pay the sum due, and legal accostomed fees, or until he should be otherwise delivered by due course of law." *Per Cur.* The warrant of commitment in this case was illegal, not being such as the justice had authority to make. He should have preserved the words of 49. Geo. 3. If he had so done, it would have given the party committed the option either of paying the money or of staying three months in prison, and being discharged altogether from the payment. This warrant is for his imprisonment, till he should pay the money, and deprives the party of that advantage. The difference is a most material one, and it gives the party committed, a right of action against the magistrate. Rule refused.

3. WELLER v. TOKE. E. T. 1808. K. B. 9 East. 364. S. P. BILLINGS v. BUNN. 1773. C. P. 2 Blac. 1017.

This was an action of trespass against a justice of the peace for having, without the concurrence of any other magistrate, committed the plaintiff for not filiating her bastard child, in violation of the act of parliament 18 Eliz. c. 3. s. 2. by which jurisdiction, over the subject matter is committed to two magistrates. The plaintiff was nonsuited, it being urged at the trial that more than twelve months had elapsed since the transaction, and that no previous notice of the action had been given to defendant, according to the 24 Geo. 2. c. 44. which the learned judge before whom the cause was tried deemed requisite. In support of a motion which was now made to set aside the nonsuit, it was now contended, that the act could not be said to have been done in the execution of his office, and that the statute only intended to protect magistrates acting erroneously or irregularly within the limits of official authority.

Per Cur. It is not denied that the defendant might have acted conjointly with a brother justice upon the subject matter of the complaint, although the act of commitment cannot be said to have been done *virtute officii*. The subject matter was not therefore wholly alien to, but on the contrary, was within his jurisdiction. See 2 Pl. Rep. 1017; 4 Esp. 542; 5 East. 233.

4. **REX v. TAYLOR.** E. T. 1765. K. B. 3 Burr. 1680; S. C. 1 Pott. 479. [220]

The defendant, a married woman, was brought up by *habeas corpus* from Lancashire, having been committed to the house of correction, for disobeying an order of justices, who adjudged her child to be a bastard, and ordered her to pay the parish 8d. a week for the maintenance of the said child while it remained chargeable. *Lord Mansfield.* A *feme covert* is liable to be prosecuted for crimes committed by her. This woman has disobeyed the order of the justices, and stat. 18 Eliz. c. 3. prescribes the punishment here inflicted upon her. There is no need to summon the husband in a criminal prosecution against the wife.

of such action must be given to him in conformity with the stat. 44 G. 2. c. 24.

And a married woman may be committed for not maintaining her previous bastard child pursuant to an order.

Even before the stat. Jac. justices had no power to commit the mother to prison for life for the first offence.

(d) *Of the punishment of the mother or reputed father.*

SLATER'S CASE. E. T. 1637. K. B. Cro. Car. 470.

A. was charged by B. with the getting of a bastard child upon her body. The two next justices did not make any order in it, according to the statute in 18 Eliz.; but the cause came first to be heard at the general sessions of the peace in the county of L., where the justices ordered, that whereas it was approved by witnesses, and that the said B. had confessed, &c., that she be committed to the house of correction during her life, and J. S., the reputed father, should pay for the keeping of the child weekly, 14d. Afterwards, at the assizes at L., the judges ordered, that the two next justices of the parish where the child was born, should take consideration thereof, and settle such a course as in justice appertained; whereupon two justices declared A. to be the reputed father, and that he should pay 18l. to the overseers of the parish, and 14d. weekly. And that he refusing to pay, the justices thereupon committed him. Upon a *certiorari*, A. appeared in the King's Bench upon the return of it. In this case, it was resolved, that the commitment of B. for her life, for her first offence, was more than the justices had authority to do.

(e) *Of the consequences of the mother or reputed father absconding.*†

1. **THE QUEEN v CHAFFEY.** E. T. 1702. K. B. 2 Ld. Raym. 858; S. C. 3 [221]
Salk. 66.

Several orders having been made by the justices of W. against defendant,

The justices cannot make an order for the overseers, &c. to seize

* And now by the 50 Geo. 3. c. 51. s. 1. the statute 7 J. c. 4. s. 7. for punishing lewd women who have bastards is repealed, and it is enacted by sec. 2. that from and after the passing of the act, in cases where a woman shall have a bastard which may be chargeable to the parish, it shall be lawful for any two justices of the peace before whom such women shall be brought, and they shall or may, at their discretion, commit such women to the house of correction for the district or place, and there to be set on work for any time not exceeding twelve calendar months, nor less than six weeks.

And by sec. 3. it shall be lawful for any two justices of the peace at any petty session for the division wherein the parish to which such bastard may be chargeable, is situate, upon their own knowledge, or a certificate duly authenticated from the keeper of such house of correction in which such woman shall have been confined for any space not less than six weeks, of the good behavior of such women during such her confinement, and of the reasonable expectation of her reformation, by warrant under their hands and seals, to order such woman to be immediately (or at the time to be appointed in such warrant) discharged and released from further confinement.

Sec. 4 provides, "that nothing in the act contained shall extend or be construed to extend to authorize any justices of the peace to commit any such woman to the house of correction until she shall have been delivered for the space of one calendar month."

If the mother will discharge the parish of keeping the bastard, it appears questionable whether she can be legally committed either under the 18 Eliz. or 50. Geo. 3. c. 51: see *Blac. Com.* 65. It seems neither reasonable nor legal to commit the child with the mother. It ought to be left to her own option, particularly if the child is in arms, which is most frequently the case, to take it with her or leave it. If left, it must be supported by the parish in which it is legally settled, which is ordinarily that from which the mother is committed. *Dalt. c.* 11. p. 34.

† By the 13 & 14 Car. 2. c. 12. s. 9. whereas the putative fathers and lewd mothers of bastard children run away out of the parish, and sometimes out of the county, and leave the bastards upon the charge of the parish where they are born, although such putative father and mother have estates sufficient to discharge such parish, it shall and may be lawful for the churchwardens and overseers of the poor of such parish where any bastard shall be born, to take and seize so much of the goods and chattels, and receive so much of the annual rents or profits of the lands of such putative father or lewd mother as shall be ordered by any two justices of the peace, for or towards the discharge of the parish, to be confirm-

what property they think sufficient to indemnify the parish.

as the putative father of a bastard, were removed by *certiorari* into this court. On motion to quash one of them, which ordered the churchwarden and overseers to seize the defendant's goods to secure the parish from the maintenance of the child, because by 13 & 14 Car. 2. c. 12. the justices have only authority to empower the churchwardens, &c. to seize what the justices should think proper, and not what the churchwardens, &c. should think proper, &c., and for that reason the Court quashed the order.

And before they must make an order that he is in arrears.

2. *BRIDGE v. ST. MARY-LE-BONE*. M. T. 1704. K. B. 11 Mod. 65.

On certifying an order of justices, on stat. 4 Eliz. c. 6. an exception taken to the order was, that the judgment ought to have been, that inasmuch as they had ordered him to pay the money, and he had refused to pay, that he should stand committed; but in this case it was that they ordered him to pay so much, and in case he refused, then, &c. *Holt, C. J.* said, the act directs in what manner the money shall be levied; that is, first, an order or judgment that he is in arrear; then, if he makes an actual refusal, an award of a distress; and if a return is made that he has nothing to be distrained by, then a commitment.

[222]

The 43 Geo. 3. c. 58.* extends to all cases of concealment of the birth, whether the child be born alive,

(f) *Of murdering or concealing the birth of bastard child. As to giving poison to procure abortion, see ante, vol. i. from p. 95 to 97.*

1. *REX v. SOUTHERN*. Sum. Ass. 1809. K. B. Cited 1 Burn. J. 335. 24 edit. by Chetwynd.

The prisoner was indicted for the wilful murder of her female bastard child. It was proved that in the course of the night she was delivered of the child, which, at four o'clock in the morning, she took and threw into the privy; it also appeared that she had provided a cap, and some trifling articles of child-bed linen. No marks of violence appeared on the body of the child; and the surgeon, who examined the prisoner soon after her delivery, added, that from the state of the after-birth, and from the appearance of the child, he was of opinion, that even, if the child had been born alive, it could only have lived for a very short period. For the prisoner it was contended, that the statute of 43 Geo. 3. c. 58. did not apply to the case of a still-born bastard child, and argued from the construction which had been put upon the former statute 21 Jac. 1. c. 27. (the defects of which it was the object of the 43 Geo. 3. c. 58. to remedy, and within the provisions of which the present case would not fall,) that even if it did not sufficiently appear that the child was born dead, the circumstance of the prisoner having made provision for the birth would take the case out of the statute. But *Bayley, J.* said, he should rule that the 43 Geo. 3. c. 58. extended to all cases, whether it was proved that the child was still-born, left the matter in doubt; and that he was of opinion, in this case, there was sufficient evidence to go to the jury of a concealment of the birth. He also said, that if the

Or that fact be a matter of doubt.

ed at the sessions, for the bringing up and providing for such bastard child, and thereupon it shall be lawful for the sessions to make an order for the churchwardens or overseers of the poor of such parish to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid as the Court shall think fit, and to receive the rents and profits, or so much of them as shall be so ordered by the sessions as aforesaid of his or her lands.

* By 21 Jac. 1. c. 27. concealment of the death of a bastard was made an undeniable evidence of murder in the mother, except she could prove, by one witness at least, it was born dead. But this law, which was accounted to savour strongly of severity, and always construed most favorably for the unfortunate object of accusation, is repealed, together with an Irish act upon the same subject, by 43 Geo. 3. c. 58. (called Lord Ellenborough's act) which enacts, "that the trials in England and Ireland respectively, of women charged with the murder of any issue of their bodies male or female, which being born alive would by law be bastard; shall proceed and be governed by such and the like rules of evidence and of presumption as are by law used and allowed to take place in respect to other trials for murder, and as if the said two several acts had never been made."

Sect. 4. Provided always, and be it enacted, that it shall and may be lawful for the jury, by whose verdict any prisoner charged with such murder as aforesaid shall be acquitted, to find, in case it shall so appear in evidence, that the prisoner was delivered of issue of her body, male or female, which if born alive would have been bastard, and that she did, by secret burying or otherwise, endeavour to conceal the birth thereof, and thereupon it shall be lawful for the Court, before which such prisoner shall have been tried, to adjudge that such prisoner shall be committed to the common gaol or house of correction for any time not exceeding two years.

prisoner had avowed her pregnancy whilst she was in that state, or had, to the knowledge of any other persons, made preparation for her confinement, these circumstances would undoubtedly have been evidence to have satisfied a jury that the putting away the child was not for the purpose of concealing the birth, but that they would only have been matters of evidence, and would not have withdrawn the question of concealment from the consideration of the jury. [223]
The prisoner was found guilty of the concealment.

2. *REX v. CORNWALL* Oold Bailey. May Sess. 1817. K. B. Cited 1 Burn. J. 335. 24th edit. by Chetwynd.

In this case the prisoner was convicted of concealing the birth of her bastard. From the circumstances in evidence, the probability was that the child was still-born, and that a female accomplice assisted in the delivery. The Recorder having a doubt on these facts, a reference was made to the judges, who held, 1st, that it was no answer to the charge of concealment that the child was still-born; and, 2dly, that the knowledge of the birth by an accomplice did not take the case out of the statute.

Or the child be still-born.

3. *REX v. MARY COLE*. Lent. Ass. 1813 N. P. 3 Campb. 371.

The prisoner by the coroner's inquest was charged with the murder of her bastard child. The bill being thrown out by the grand jury, the question was, whether she could be found guilty of the concealment. It was contended for the prisoner, that the 43 Geo. 3. c. 58. s. 4. authorised a jury to find a prisoner guilty of concealment *only* where she is indicted for the murder, and not where she is tried on the *coron r's inquest*. But *Bayley, J.* said, the judges had determined that a prisoner may be found guilty of the concealment in either case.

And a woman sued on the coroner's inquest for murdering her bastard child, may be found guilty of concealment.

V. RIGHTS AND INCAPACITIES* OF BASTARDS.

(A) WITH RESPECT TO HIS CAPACITY TO INHERIT.

No person can succeed to an estate as heir who is not born in lawful matrimony; for it is a maxim of law, that *hæres legitimus et quem nuptiæ demonstravit*, and a bastard, being *filius nullius*, can neither inherit from his father or mother, consequently can have no heirs but his own children; 1 Co. Lit. 146; 3 Cruise. Dig. 364. But he may be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament; 4 Inst. 36.

(B) WITH RESPECT TO HIS CAPACITY TO TAKE BY BEQUEST OR DEVISE.

Although a bastard may be a devisee, he must, for that purpose, have gained a name by reputation, in order that the devisor may describe him. As where a person devised an equal share of his estate to his two sons, James and Charles Rivers, *Lord Hardwicke* said, the question was, whether, as it appeared James and Charles were two illegitimate children, this was such a description of their persons as would entitle them to take under the will? In the case of a devise, any thing that amounted to a *designatio personæ* was sufficient, and though in strictness they were not his sons, yet if they had acquired that name by reputation in common parlance, they were to be considered as such. It had been said, the testator had made a mistake in their names, and therefore they could not take; but the law was otherwise; for if a man was mistaken in a devise, yet if the person was clearly made out by averment to be the person meant, and there could be no other to whom it might be applied, the devise to

* The law, which to some purposes, we have seen, incapacitated bastards, was supposed to convey reproach to their descendants; for while the rules of heraldry were rigidly observed, when personal merit was deemed to claim distinction in society, not only mental but visible, and each aspirant bore on his escutcheon the ensigns of his deserts, it was considered necessary to mark, with the utmost precision, the various families and individuals who might be entitled as the conduits of a worthy stock to some, though after a lapse of time, a small share of public estimation. Such illegitimate offspring, therefore, though allowed to bear his paternal arms as a mark of his extraction, was obliged to show his exclusion from the lineal honours of his family, by the introduction of either a *baton* or a *bordure*, which was placed over the arms, and varied in colour according as the bastard sprang from a prince or a subject. This stain was, in a subject, indelible; though after a removal of three descents, it might be changed; but some heralds are of opinion, that a prince had the power of relieving his bastard issue from such opprobrious bearing, or that the issue himself might effect a change.

him was good; *River's case*, 1 Atk 418. So in the case of *Wilkinson v. Adam*, 1 V. & B. 422; it was holden, that under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children, who had acquired the reputation of being his children by her before the date of the will, were entitled as upon the whole will intended, and sufficiently described. But in a subsequent case of *Swaine v. Hennerby*, 1 V. & B. 469. Lord Eldon held, that under the description of children in a will, illegitimate children existing at the date of the will were not entitled, unless proved by the will itself to be intended; and that evidence could be received only for the purpose of collecting who had acquired the reputation of children. But it should be observed, whenever there is a conflict between the two claims of existing legitimate and illegitimate children under a bequest "to children," the will must be taken to mean legitimate children; *Beachcroft v. Beachcroft*, 1 Mad. 430. may inherit.

(C) WITH RESPECT TO HIS CAPACITY TO PURCHASE BY REPUTED NAME.

A bastard having acquired a name by reputation may purchase by his reputed or known name; and his heirs, although he can have no heir but of his body; 39 E. 3. 11. 24; 17 E. 3. 42; 35 Ass. 13; 41 E. 3. 19; 1 Co. Lit. 148; may inherit.

(D) WITH RESPECT TO HIS BEING ADJUDGED A BASTARD POST MORTEM.

PRIDE v. THE EARL OF BATH. II. T. 1693. K. B. 1 Salk. 421; S. C. 8 Lev. 110.

The rule that a person cannot [225] be bastardized after his death, only exists in the case of bastard *eigne* and *mulier puisne*.

In ejectment brought by *Pride* against the earls of Bath and Montague, *Pride*, the plaintiff, made title as heir to George duke of Albermarle, proving himself the son of the brother to the duke, and that the duke died without issue. The defendants gave evidence that Duke George had issue Duke Christopher, who conveyed to them. The plaintiff proved that Duke Christopher was a bastard, begotten of a woman who, at the time of her marriage with the said George Duke of Albermarle, was married to another man, then and still living. To this it was objected, that since Duke George and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to bastardize the issue, who was dead also, and who, during his whole life, was reputed and taken to be the legitimate son of the duke, and styled by the duke himself in his deed of settlement, and in his last will and testament, his son and heir; and that it is not just to bastardize any one after his death. The Court held this true of such a bastard as is meant by Lit. 149. in his case of *bastard eigne* and *mulier puisne*; that is, such a bastard as is born before the espousals of a father and mother who marry afterwards; and said the rule extended only to that case. If H. marries a woman, and that woman marries again during the life of H., the last marriage is void without any divorce, and the jury shall try the fact which proves it no marriage; and the reason why the spiritual court cannot give sentence to annul a marriage after the death of the parties, is, because the sentence is given only for the salvation of the soul, and after death it is too late to effect that.

(E) WITH RESPECT TO HIS BEING WITHIN THE MARRIAGE ACT.

HAINS v. JEFFELLS. H. T. 1695. K. B.; S. C. 1 Ld. Raym. 68; S. C. Burr. Ecc. Law. 514; S. C. 1 Comb. 356; S. C. 5 Mod. 168.

A person cannot marry his sisters illegitimate child, nor can a bastard marry his own daughter.

On a prohibition being prayed to the spiritual court, where there was a libel for an incestuous marriage, the plaintiff having married his sister's bastard, it was contended, that this was not within the degrees prohibited by the 32 Hen. 8. c. 38. for a bastard is not within the laws of any one. But the court was of opinion, that no prohibition should be granted; for though bastards are deprived of privileges by particular laws, the same reason prohibits them from marrying as others; and it has been always held accordingly, especially where it is the child of a woman relation. And as it is argued, *Haines* might marry his own bastard, which doubtless could not be allowed.

2. *REX v. THE INHABITANTS OF HODNET*. II. T. 1786. K. B. 1 T. R. 96.

On an appeal from the sessions upon a removal of a pauper, it appeared the pauper and his wife being both illegitimate, and under age, and the mother of

And as the marriage

the wife being the only parent of either then living, and no guardian having ever been appointed for either; were married without any consent; the questions were, 1st, whether bastards were within the meaning of the Marriage Act 26 Geo. 2. and, 2d, whether this marriage was valid. the 26 Geo. 2 requiring on the marriage of infants, the consent of father, guardian or mother.

Per Cur. We see no reason to except illegitimate children, from the clauses contained in the marriage act, especially since the rule that a bastard is *nullus filius* was considered by Lord Coke to apply only to the case of inheritances. Having disposed of the first point, that brings us to the second, which is fatal; the meaning of the act being, that where there is not the consent of a father, or guardian lawfully appointed, or of a mother, or guardian appointed by the Court of Chancery, the marriage shall be null and void. Here being no such consent, we must pronounce the marriage void.

(F) WITH RESPECT TO AFFECTION FOR, BEING SUFFICIENT TO RAISE A USE.

Love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seised; 1 Co. Lit. 147.

(G) WITH RESPECT TO HIS TAKING AS A REMAINDER-MAN.

A limitation to a bastard is void. for where a man made a feoffment to the use of himself for life remainder to the use of such issue of the body of M. L. as should by common supposition be adjudged to be begotten by the feoffor, whether legitimate or illegitimate, it was resolved, that the remainder was void, because the law doth not favour such a generation; *Blodwell v. Edwards* Cro. Eliz. 509. But if he hath gained, by time, a reputation to be known by the name of a son, then a remainder limited to him, by the name of the son, of his reputed father, is good; 1 Co. Lit. 149.

(H) WITH RESPECT TO INSTANCES IN WHICH THE POLICY OF THE LAW OPERATES IN HIS FAVOUR

The policy of the law, which does not acknowledge the relation of a natural child, operates in one instance, in favour of illegitimate children. For, "in the case of children, as such the law recognizes the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such child; but as the law does not recognize the relation between the putative father and illegitimate child as imposing this debt of nature, the father, in that case; stands as a stranger, and no such presumption arises; in that case, where the subsequent advance is not proved to have been for the very purpose of satisfying the legacy, the legatee is entitled to both;" 18 Ves. 152. Formerly it was held, that a court of equity would not supply the want of a surrender of a copyhold estate in favour of a bastard, as it would do for a legitimate child; Pre. ch. 475; Gilb. Eq. Rep. 139; 2 Ves. 582. But now, by 55 Geo. 3. c. 192. a disposition by will of copyhold estates, is effectual without a previous surrender to the uses of the will.

(I) WITH RESPECT TO THE PREROGATIVE OF THE CROWN TO TAKE HIS PERSONAL AND REAL ESTATE.

When a bastard dies intestate, the king takes his effects subject to his debts; *Megit v. Johnson*. 2 Doug. 542. abridged post, tit. Prerogative. So the king, or other immediate lord of the fee is also entitled to a real estate of inheritance of which a bastard dies seised, without having devised it, and without leaving issue; this is the result of a bastard's being supposed to have no relations, no heirs, or next of kin, except those arising from his own contract of marriage, namely, his wife and progeny. But the rigorous exertion of this prerogative would in many obvious cases carry the appearance of great hardship. It is usual therefore to make over the royal prerogative to some one, not indeed quite unconditionally and gratuitously, but with the reservation of a tenth or other small proportion of the value both of real and personal estate; 3 P. Wms. 33; 3 Woodd. 397.

Each Turnpike Act,

PARSONS v. BLANDY. E. T. 1810. Ex. Wightw. 22.

A rule to show cause why a nonsuit should not be entered after verdict for the plaintiff, disclosed these facts; that the defendant, a turnpike keeper, hav-

Where a toll gate keeper levies an extra toll, and upon adjunction, by two magistrates it was determined (under the Bath Act,) that it was not due, it was held that it might be recovered, in *assumpsit*, and that notice of action was unnecessary.

[228] It is a misdemeanor for a man to expose his person on the sea shore for the purpose of bathing in a spot where he may be distinctly seen.

As there is no common law right for the public to bathe in the sea, and to pass over the shore for that purpose on foot, and with horse and carriage

ing levied double toll upon a wagon belonging to the plaintiff, he made application to two justices of the peace in pursuance of the directions of the Bath Act, who, upon hearing the complaint, adjudged the single duty only to be payable; the defendant refusing to repay the surcharge, the plaintiff brought this action of *assumpsit*. The rule was obtained on two grounds; 1st, because the proper remedy in this case, under the Bath Act, was by appeal to the quarter sessions; and, 2d, if the action of *assumpsit* would lie, still notice ought to have been given pursuant to the direction of that act.

Pec Cur. This action for money had and received may be sustained. With regard to the first point, namely, appealing to the quarter sessions, if that is the proper relief; this action would not lie; but if we read this act right there is no appeal in the present case; there is a particular remedy given, namely, an application to two magistrates. As to the notice, this is not an action for anything done in pursuance of the act; the instant the two justices had determined this case, and ordered the return of the money, this right of action accrued, and not before; this statute is very confused; but the best opinion we can form from it, we think this not a case that requires us to interfere. See 14 Geo. 3. c. 82. s. 2. 10. 45; 5 East. 122; Cowp. 414; 4 T. R. 485.

Bathing.

J. REX V. CRUNDEN. Lent Ass. 1809. N. P. 2 Campb. 89.

On an indictment against the defendant for undressing himself on the beach, and bathing in the sea near inhabited houses, from which he might be distinctly seen, although the houses, it appeared had been recently erected, and until their erection it had been usual for persons to bathe in great numbers at the place in question. M'Donald, C. B. ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence was a misdemeanor, and that he had been properly convicted. See 2 Sid. 168; S. C. 1 Keb. 620; 1 East. P. C. c. 1. s. 1; 1 Hawk. P. C. c. 5. s. 4; 2 Stra. 783.

2. BLUNDELL V. CATTERALL. M. T. 1821. K. B. 5 B. & A. 268.

This was an action of trespass brought against the defendant for passing with carriages from some place above high-water-mark across that part of the shore which lies between the high and low-water-mark, for the conveyance of persons to and from the water, for the purpose of bathing. The plaintiff as lord of the manor, was the undoubted owner of the soil of that part of the shore, and had the exclusive right of fishing thereon with stake nets. The defendant did not rely upon any special custom or prescription for his justification; but insisted on a common law right for all the king's subjects to bathe on the sea shore, and to pass over it for that purpose on foot, and with horses and carriages; and this right was now, by the terms of a special case, submitted to the opinion of the Court. Best, J. differed from the rest of their lordships, and observed, The defendant is in this case, I must hold, entitled to a verdict. My opinion is founded on these grounds. 1. The shore of the sea is admitted to have been at one time the property of the king, who held it for all his subjects. The soil could, therefore, only be transferred subject to this public trust. 2. This right is supported by analogy. 3. The exercise of this privilege does not interfere with private property. 4. The right is borne out by universal practice. 5. Our law books are confirmatory of the general position; and, 6. Policy requires it. First, then, I asserted that the shore of the sea is admitted to have been at one time the property of the king, who held it for all his subjects, and that the soil could consequently only be transferred subject to this public trust. A person who will dispute the public right now contended for by the defendant must therefore establish, first, that the king had an exclusive possession of the shore over which it is said the defendant trespassed, and that a right to such exclusive possession has been conveyed from the crown to such person. But if we go on to the consideration of our second proposition, that this right is supported by analogy, we shall find that, from the present state of the shore, the crown seems all along to have used it subject to this common

law privilege. For instance, the public, generally speaking, have a right to fish on the coast and on arms of the sea, and to cross its shores for that purpose, although the right may in some few instances have been interfered with where individuals claim under a grant from the crown, or by prescription, which presupposes a grant. Some parts of the shore are also held exclusively by the crown for harbours, warehouses, &c. But the greatest part was left open as a common highway between the sea and the land. From the state of the greatest part has arisen the general rule or common law right; and the state of the portions exclusively occupied has occasioned the exceptions. This brings us to the third division of my argument, upon which I rely, that the exercise of this privilege does not interfere with private property. Private individuals may possess advantages connected with the shore. All I say is, that they cannot possess any which can authorise them to preclude the public from their permanent right of free passage over it. The general freedom of passage over the shore is not incompatible with the occasional construction of quays or wharfs, as they are rarely, in point of fact, so situated as to offer any real obstruction to persons crossing the shore for a lawful purpose. And if they should be so situated as, instead of conducing to the better use of the shore, to become actual obstructions thereto, they may be abated as nuisances; and then it must be recollected that it is a general principle of the English law, and in fact of all other laws, that private rights can only be upheld where their establishment is not controlled by the laws legalising an important public right paramount to the former. The owner of the soil of the shore may, therefore, erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede as little as possible the public right of way. The law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of the one is not injurious to the other. Goods, it is true, cannot be landed or loaded, except at particular places; but this restraint was imposed by laws made for the revenue, and the security of the realm, and is not the consequence of any rights in the owners of the soil of the shore. Men have landed from boats, drawn their boats on the sands during their stay on shore, and embarked again in their boats. Persons have at all times, and from the earliest periods, walked or ridden on the sands; and as many of our most valuable common law rights are only to be collected from the universal and immemorial usage throughout the country, let us examine our fourth position, and see how long the practice of bathing has been considered as established by custom. Now unless in places or at seasons when parties could not consistently with decency be permitted to be naked; no one ever attempted to prevent the public from bathing on the sea shore. Besides, this position is supported by the whole tenor of our law books; for although there is nothing of a decisive nature upon the point exactly before us to be found either in the civil or common law, yet the general purport of the authors who have written either on the one law or the other, and who have handed down to us the established regulations to be adopted in our judicial system, co-operate in defeating the plaintiff's right. We must, therefore, carefully examine the various statements of those writers, and the opinions of our lawyers delivered as axioms, or to be collected from universal usage. This right is, however, so important to the best interests of the country, that had not the constant exercise of it been sufficient to establish it, the legislature would no doubt have declared it to be in the people of England. Bracton, lib. 1. c. 12. s. 6, says, "*Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium sicut ipsius fluminis. Itaque naves ad eas applicare funes arboribus ibi natis religare onus aliquod in iis reponere cuivis liberum est sicut per ipsum fluvium navigare; sed proprietates earum illarum est quorum prediis adherent et eadem de causa arbores in eisdem natæ eorundem sunt; et hæc intelligenda sunt de fluminibus perenibus quia temporalia possunt esse privata.*" Mr. Jus-

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tice Buller, in the case of *Ball v. Herbert*, (3 T. R. 263.) speaking of this passage in Bracton, says, "that it plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not it has been adopted by the common law is to be seen by looking into our books, and there it is not to be found." Lord Hale, however, in his *History of the Common Law*, mentions Bracton as a good authority. But if we look further we shall find this passage quoted by Callis as English law; and I have often heard Lord Kenyon speak with great respect of that writer. In Fortescue, p. 408. Lord C. J. Parker, supports the same doctrine, and observes, "As to the authority of Bracton, to be sure many things are now altered, but there is no colour to say that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitting to the existing state of things, it must alter as the state of things to which it relates alters. For instance, it is objected that Bracton says that any one may in any river fasten vessels with ropes to trees on the banks, and unload the cargoes on the banks. Undoubtedly the public cannot pretend to claim this right in all navigable rivers. Many rivers have been rendered navigable since Bracton wrote, which in his time were private streams. But Bracton speaks not of newly-made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This, therefore, distinguishes the case of *Ball v. Herbert* (overruling Lord Raym. 725; 6 Mod. 163.) from the point now before us. That case only applied to the banks of a navigable river. The claim there made, if maintainable, would have established the right to tow on both sides of all navigable rivers, although this is contrary to general practice, and although most of the navigable rivers in the kingdom have been made so under the different acts of parliament passed subsequently to the lawful construction of dwelling houses, &c. upon their banks, whereas the barren sands of the sea shore, covered by the sea every tide, are no where so appropriated. The fact too, that such acts have been repeatedly passed to make rivers navigable, and to appoint towing paths on their banks, within certain limits, shows that such paths did not previously exist at common law. The shore is not, however, free from any particular law giving this freedom, but from the general right of passage over it, which the usage of the whole coast I have previously mentioned shows to have been reserved for the benefit of the public, out of the grant of the soil by the crown. Having now, therefore, shown the legal grounds of my judgment, and delivered my sentiments in favour of the defendant, deeming him no trespasser for the reasons already assigned, I shall now shortly notice why policy dictates that the right of the defendant to bathe in the open sea, and to pass along the *locus in quo* for that purpose, should be upheld.

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First, it has been at all times the policy of this country to encourage navigation. Now by bathing, those who live near the sea are taught their first duty to assist mariners in distress; and besides, if judgment be given for the plaintiff, navigation will be checked, as there are many cases in which there is neither immediate necessity, nor imminent danger, in which boats must pass between ships at sea and the shore, and which cannot be legally done if the defendant is a trespasser, no special statute or rule of common law securing the right of passage over the shore for purposes connected with navigation. And, secondly, bathing promotes health, and should not be therefore impeded, but rather encouragement given to the practice. For these reasons I feel bound to dissent from the rest of the Court, and hold that bathing in the sea, (and as to the right to bathe from machines, it exists as an accessory to the general right,) is not only lawful, but proper, and often necessary for many of the inhabitants of this country.

Sed per Abbott, C. J., and Bayley and Holroyd, Js. This question had been placed on a broader ground than it is necessary to argue it; for it has been contended, that the waters of the sea are open to all persons for all lawful purposes, there must be an equally universal right of access to them for all such purposes over-land like the present. Now, if this general proposition

could be established, there could be no doubt as to the right of the public to bathe in the open sea, and, as an accessory to such right, to traverse the shore for that purpose; but let us examine the tenability of the grounds upon which such a general right must rest. The sea-shore may indeed, by grant or prescription, belong to a subject; but until the contrary is known, the presumption is that it belongs to the king. Many of the king's rights are to a certain extent for the benefit of the subject, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing; and the king can make no modern grants in derogation of those rights. These rights are noticed by Lord Hale; but whatever further rights, if any, they may have in the sea, or in navigable rivers, it is a very different question, whether they have, or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between the high and low-water-mark), when it is not sea, or covered with water, and especially when (as in the present case) it has from time immemorial been, or has since become, private property. True it is, that the public are enabled to get upon the sea to exercise those rights to which they are entitled; but not only the ports of the kingdom, but also public places for embarking and landing are in their power. The case of *Bagott v. Orr* (2 B. & P. 472.) bears us out in our position. The defendant there justified trespassing on the rocks and sands lying within the flowing and re-flowing of the tide, on the ground that every subject of the realm had the liberty and privilege of getting and taking away shell-fish and shells, which had been left there by the tide. The general right of the public to take fish off the sea was admitted in argument, but the right to take shells cast on the shore was denied; and it was insisted, besides, that the general right was excluded where the shore was a parcel of a manor. The question was at last disposed of, upon a point relative to the pleadings; but the Court deeming the claim as to the shells very questionable, the defendant amended by confining his claim to the sea-fish. [232] Lord Hale, in his *Treatise de Portibus Maris*, p. 51. says, that where a party unloads where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof, who may in such case take amends for the trespass in unloading upon his ground, the party deviates from what is prescribed by law; and he then (p. 53.) says, "in case of necessity, and for the supply of fishermen, all places were to that purpose and end ports." Now this is not consistent with the general right contended for, as being in the public, of coming on the shore for their purposes in general, and as when they please. A contrary rule may appear to have been laid down in *Fitz. Carre*, 93, which cites 8 Ed. 4. c. 19; but in *Bro. Abr. Customs*, 46. the same case is more fully stated, where the doctrine appears to have been laid down on a question which arose upon a custom. It may be, however, said, that the authority of Bracton is insurmountable; but we must hold that this opinion, besides being, as we shall show, untenable in this particular instance, cannot be noticed, as the variance between the common law and the civil law, in other respects, as to marine properties and rights, shows that the civil law cannot be any guide, or afford any illustration, to us in these matters. But in the particular case before us, Bracton cannot be considered as an authority; for in the quotation from his works, (*vide ante*, p. 230.) mentioned by Judge Best, passages are contained irreconcilable with our law. Can it be said, that all persons have a right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the banks of every navigable river? The case of *Ball v. Herbert* is not a distinct authority upon this point, inasmuch as in that case the right of towing was claimed. But the general question, as to the right of the public on the *ripa* of a navigable river was discussed; and the Court appear to have been of opinion that the *ripa* of a navigable river was not *publici juris*; and they therefore virtually over-ruled the authority of Bracton. "And as touching ports, and the public right to them," says Lord Hale, p. 84. "Bracton saith true, but with this alloy, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the

king, or that which presumes and supposes it, viz. custom and prescription." So that even the privilege to be derived from ports cannot be in its nature universal. And as to ports, Lord Hale, ch. 6. p. 73. distinguishes between the interest of property, and the interest of franchise; and says, "that if A. hath the *ripa* or bank of the port, the king cannot grant liberty to unload on the bank or *ripa*, without his consent. unless custom hath made the liberty thereof free to all, as in many places it is." Having thus shown that there is no general right, such as has been stated, let us next examine upon what basis the particular right or privilege claimed in the present case is founded. In giving judgment upon this part of the case, we shall show that such right cannot be established by us, for the following reasons. It is not supported either, 1st, by necessity; 2d, by the general usage of the realm; 3d, by special usage; nor if it were, would it follow. 4th, that it was such a common law right as might not by prescription at least be otherwise appropriated; and 5th, it is contrary to analogy, and to acknowledged private right. The impossibility of this supposed right being founded upon necessity, is obvious, as the whole shore cannot be necessary for its exercise. Besides, it may be desirable to apply parts of the sea-shore to other purposes. Nor is the necessity of the right evidenced by the general usage of the realm; at all events, by usage so extensive and uniform, as to form the ground of a judicial decision; and the practice of modern times cannot of itself be looked upon as a cogent reason, the exercise of the right being probably permitted to remain undisturbed by some who may not think it worth their while to interfere; and by others from interested motives, occasioned by the increased value of their lands by the resort of company. But it is unnecessary for us to look to the general usage of the realm as respects the privilege to bathe, as in this case it is negatived; and the defendant even allows that there was no special usage. And even if a special custom in the particular places had been established, still it might be appropriated. General common law rights are frequently appropriated by prescription at least. In *Carter v. Murcott*, (4 Burr. 2162.) Yates, J. said, "by the law of England, what is otherwise common, may by prescription be appropriated." On that ground, it is therefore clear, that the plaintiff, as lord of the manor, cannot be disturbed in a free and exclusive privilege of the soil, and the enjoyment of those private rights, which would otherwise be invaded and rendered a complete nullity; and to judge from analogy, that has never been permitted. In situations such as the present, many acres have been at times gained from the sea and converted to pasture and tillage. But how could such improvements have been made, or how can they be made hereafter, without the destruction or infringement of this supposed right? And it is to be observed, that wharfs, quays, and embankments, and intakes from the sea, are matters of public as well as private right; which, if the defendant's position holds true, may be pulled down, for no length of time can legalize a nuisance, which there must be if this right existed. But it may be said, that this argument, as to private right, is broken down by those passages contained in Lord Hale's treatise *De Jure Maris*, in which it is laid down that the *jus privatum* that is acquired to the subject, either by habit or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use. These observations, however, leave the question untouched; as Hale does not define what the *jus publicum* is, which is the very thing we have now to pronounce judgment with reference to. For these reasons, and aware that material inconvenience cannot accrue to the public, as in those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom, and where that is not the case, the crown or its grantees are not likely to withhold it upon proper terms, and under proper regulations, we must give the judgment for the plaintiff. See 5 Rep. 107; Dyer. 326; the Attorney General v. Roll, cited Hale, p. 27; 1 Ves. sen. 115; 2 M. & S. 361; 2 B. & P. 472; Grotius de Jure Pelli et Pacis, c. 2. s. 3 & 4; 1 Mod. 105; Just. Inst. lib. 2. tit. 1. s. 2. & 4.

Battery, See tit *Assault and Battery*.

Battle, See tit. *Duel*.

Battle, Trial by. See ante, vol. i. *Appeal*, p. 722. note.

Bawdy-house,

REX v. WILLIAMS. M. T. 1710. K. B. 1 Salk 384.

This was an indictment against husband and wife for keeping *commun, domum, Anglice*, a common bawdy-house. Upon motion to quash it, the objection was, that the keeping a house could not be the keeping of the wife any more than it is the keeping of the servant. But to this it was answered, and resolved by the Court, that the wife may be guilty and commit a crime with her husband, and that that crime is joint and several. Husband and wife may commit a trespass, murder, treason, &c. Keeping a bawdy-house is a common nuisance, and the indictment for keeping is a charge against them for this nuisance. The keeping is not to be understood of having or renting in point of property, for in that sense the wife cannot keep it; but the keeping here is the governing and managing a house in such a disorderly manner as to be a nuisance; and the wife may have a share in the management of a disorderly house as well as the husband.

2. SHEPHERD v. MACKOUL. M. T. 1813. K. B. N. P. 3 Camp. 326.

In an action by the plaintiff, an attorney, for business done, it appeared that he had been employed by the defendant's wife in defending her upon an indictment for keeping a house of ill-fame, which she had been compelled to do in consequence of her husband having abandoned her, and of which fact he was cognizant. *Per Lord Ellenborough, C. J.* The plaintiff is entitled to recover as the defendant knew and approved of the business his wife carried on, and was aware of the precaution without expressing any dissent to the plaintiff's defending her; from which circumstances I think a promise may be inferred.

3. REGINA v. PEIRSON. T. T. 1705. K. B. 2 Ld. Raym. 1197; S. C. 1 Salk. 382.

It was agreed both by the Court and counsel, in this case, that if a person be only a lodger in a house, yet if she make use of her room for the entertaining and accommodating people in the way of a bawdy-house, it would be keeping of a bawdy-house as much as if she had the whole of the house.

4. CLARKE v. RICE. T. T. 1818. K. B. 1 B. & A. 694.

This was an action of debt on the statute of 25 Geo. 2. c. 36, s. 13. to which the general issue was pleaded, brought by an inhabitant of the parish of A. B. against the overseer of such parish, in consequence of his having refused to pay to the plaintiff the sum of 10*l.*, which is directed by that act to be paid to any two inhabitants (in this case another inhabitant had acted with the plaintiff (who should give information that should lead to the conviction of a person keeping a bawdy-house there. The act, after premising that it was passed in order to encourage prosecutions against persons keeping bawdy-houses, gaming houses, or other disorderly houses, enacts, that if any two inhabitants of any parish or place, paying scot, and bearing lot therein, do give notice in writing to any constable, or other peace officer of the like nature, where there is no constable, of such parish or place, of any person keeping a bawdy house, gaming house, or any other disorderly house, in such parish or place; the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitants to one of his majesty's justices of the peace, of the county, city, riding, division, or liberty, in which such parish or place does lie, and shall, upon such inhabitants making oath before such justices that they do believe the contents of such notice, to be true, and entering into a recognizance, in the penal sum of 20*l.* each, to give or produce material evidence against such person for such offence, enter into a recognizance in the penal sum of 30*l.* to prosecute with effect such person for such offence, at the next general or quarter sessions of the peace, or at the next assizes to be holden for the coun-

* Is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons, and also has an apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness; 1 Hawk. P. C. c. 74. 75. s. 6.; 5 Bac. Ab. 2; 3 Inst. 204, 1 Salk. 383.

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Keeping a bawdy house is an offence of which a *female covert* may be guilty as well as a *female sole*.

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And the husband is liable for the expense of a defence upon an indictment against his wife, for keeping a bawdy house, where it appears that he was privy to her so doing.

If a person be only a lodger, and have but a single room it will be a keeping of a bawdy house, as much as if the whole house were occupied, To entitle the two inhabitants to call upon the overseers for the sums payable under the 25 Geo. 2. c. 36. on conviction of keeping a bawdy house it was holden, prior to the 58. Geo. 3. that it must appear that

such prosecution was carried on by the proper officer viz. the parish constable.

[236]

ty, in which such parish or place does lie, as to the said justices shall seem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of the peace of the county, city, riding, division, or liberty, where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer such expenses of the prosecution as aforesaid, or shall neglect or refuse to pay upon demand, the said sums of 10*l.* and 10*l.* such overseers, and each of them, shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid.* It appeared, however, that in this case the prosecution had been conducted by the two inhabitants, of whom the plaintiff was one, and not by the constable; and the demand of the 10*l.* made upon the overseers, stated the prosecution to have been so conducted. At the trial, it was consequently objected, that the action was not sustainable; that the inhabitants had no right to take the benefit of the act, having taken the conduct of the prosecution upon themselves, whereas the act directed the constable to prosecute. Nonsuit. Rule nisi to set it aside.

Per Cur. The prosecution was not carried on as the act of parliament prescribes, for all that the constable did in this case was to enter into a recognizance, but the prosecution itself was not conducted by him. From the act it will be observed, that the constable is to be allowed the expenses of the prosecution; and upon conviction, the two inhabitants are to be paid (not the expenses of prosecution,) but only the sum of 10*l.* The seventh section of the act even imposes a penalty on him, if he be wilfully negligent in carrying on the prosecution. It clearly, therefore, appears to have been the intention of the legislature that the prosecution should be conducted by the parish constable, and not by the two inhabitants; and the plaintiff cannot be entitled to recover this penalty under the act of parliament. The demand too was not rightly made. It did not show the plaintiffs to be entitled to the 10*l.* under the act of parliament, for the notice given to the overseer was, that the prosecution had been carried on by the inhabitant's, nothing being said of the constable; which cannot be said to be sufficient in a case where the party neglecting to comply with the demand incurs a penalty, and where, therefore, the words of the act must be strictly complied with. The policy of our judgment must be also evident; for it is manifest that the constable, as a public officer, would probably feel himself more bound to collect all the evidence possible, than private individuals, who might, from collusion with the offender, be an impediment to the furtherance of the objects of the act of parliament.—Rule discharged.

But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication, since the indictment should be for keeping

REGINA v. PIERSON. T. T. 1704. K. K. 2 *Ld. Raym*; 1197. S. C. 1 *Salk.* 382.

A writ of error of a judgment given by the justices of the peace, at M., upon an indictment which set forth that the defendant, on such a day and year, and at divers other days at such a place, *fuit et adhuc est communis lena, Anglice*, a common bawd, *et pro commodo et lucro suo proprio adtunc et ibidem quosdam male dispositas personas, tam homines, quam mulieris in diversis domibus lupanaribus convenire scortationem et fornicationem committere adtunc et ibidem illicite procuravit, in contemptum, &c.* To this indictment the defendant pleaded not

* This act was made perpetual by the 28 Geo. 2, c. 19. But by 58 Geo. 3, c. 70. s. 7. a copy of the notice which shall be given to such constable under 25 Geo. 2. c. 36. s. 5. shall also be served on, or left at the place of abode of the overseers of the poor, or one of them; and such overseers shall be summoned, or have reasonable notice to attend before two justices, before whom such constable shall have notice to attend; and if they shall then and there enter into such recognizance to prosecute, as the constable is by such act required to enter into, then such constable shall not be required to enter into such recognizance; but if they neglect to attend, or shall attend, and decline, or refuse to enter into such recognizance, then such constable shall enter into same, and shall prosecute, and be entitled to his expenses, to be allowed as c. 7. s. 5 directed.

guilty, and was convicted and fined 100*l*. And the judgment was reversed, a bawdy house.* For the indictment ought to have been for keeping a common bawdy house. But what is charged in this indictment is but solicitation of chastity, which is a spiritual offence, and not inquirable or punishable at common law. The counsel relied on the difference in one Roll 44. n. 89., where it is resolved, that saying a woman is a bawd, no action will lie at common law; Stra. 1100; 10 Mod. 384; otherwise if you say she is a bawd, and keeps a bawdy-house, because that is an offence inquirable and punishable in a leet.

By the 25 Geo. 2. c. 36. s. 8. it is enacted, that any person who shall appear to act as master or mistress, or person having the management of any disorderly house, shall be deemed the keeper, and be prosecuted and punished accordingly, though not the real owner. By section 9, it is enacted also, that any person may give evidence in such prosecution of any disorderly house on either side, although he be an inhabitant of such parish. And,

By section 10 it is further enacted, that no indictment preferred against the keeper of any such disorderly house shall be removed by *certiorari* into any other court; but the same shall be sued, and the penalty determined at the quarter sessions or assizes where the indictment is preferred, unless the Court, on cause shown, shall adjourn the same.

6. REX V. DAVIES. E. T. 1794. K. B. 5 T. R. 626.

An indictment being found at the assizes against the defendant for keeping a disorderly house, the question was, whether the crown was precluded by the 25 Geo. 2. c. 6. s. 10. (*supra*) from removing the same by *certiorari*? The Court said, that the general words in the 10th section did not restrain the crown from removing the indictment by *certiorari*, there being nothing in the act to show that the legislature intended that the crown should be bound by it,

Headles. See tits. *Arrest; Officer.*

Beacon. See tit. *Light-house.*

Beasts. See tits. *Cattle; Chase.*

Bedford Level Act.

1. THE KING V. THE CONSERVATOR OF THE GREAT FENS, CALLED THE BEDFORD LEVEL. E. T. 1805. K. B. 6 East. 356; S. C. 2 Smith. 538.

This was an application for a *mandamus* to admit and swear A. B. registrar of the corporation of the Bedford Level. The affidavit of A. B. stated, that the death of the governors, bailiffs, and commonalty of the conservators of the Great Level of the Fens was incorporated by an act passed in the 15th of Charles the Second entitled "An Act for settling the Draining of the Great Level of the Fens called Bedford Level," which reciting that 95,000 acres of land were there vested in F., Earl of Bedford, and his adventurers and participants, enacted that he and his heirs and assigns, and the said adventurers, should be a corporation; and that the said corporation should meet as often as they pleased, and appoint a registrar and other officers, and that none of the commonalty should have voices that had not 100 acres of the said land; and that all conveyances of the said land entered with the registrar, should be of force to convey a freehold as if the same were enrolled, within six months, in the King's Bench; and no grant or conveyance should be of force but from the time it should be so entered, &c. That the usage of the said corporation appeared from the books to be to hold a court annually, to elect a registrar and other officers; that C.

* So if a person is indicted for frequenting a bawdy house, it must appear that he knew it to be such a house, and it must be expressly alleged that it is a bawdy-house, and not that it is suspected to be so; 10 Wood. Inst. b. 3. c. 3. Any number of persons may be included in the same indictment, for keeping different disorderly houses, stating that they severally kept, &c. such houses; 1 Hale P. C. 174. It seems that it is necessary to state where the house is situate, and the time, so as to make a particular statement, of the offence, which is the *keeping* of the house; 1 T. R. 754. But particular facts need not be stated; and though a charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time of doing them; 2 Atk. 339.

† On an indictment for keeping a disorderly house, a female witness swore, that she was the wife of a sailor, and during her husband's absence out of the realm she had often prostituted herself there. Lord Raymond, C. J. said, it was an odious piece of evidence, and ought not to be heard; 3 Burn. J. 247. 23 edit. cited.

a new election, do not entitle the proprietors to vote at such election.

D. was many years registrar; that in 1804 the corporation elected him registrar, with a salary of 100*l.* a year, and E. F. Deputy-registrar, without a salary, and that C. D. died the 18th of December, 1804. That on the 17th of April, 1805, there was an election for the office of registrar; that A. B. and one G. H. were the candidates; that A. B. frequently objected to the admission of votes which arose from lands conveyed by deeds registered by the said deputy-registrar after the death of the late C. D. and not before; that certain parties tendered their votes for G. H. and were objected to on that ground, and they appeared to be so entered; that at the close of the poll by consent, there was a scrutiny, and, upon argument, all the said votes were ordered to be added to the votes for G. H., and one voter of the like nature for A. B., and the numbers were for G. H. 82, and for A. B. 80; whereas, if the said votes had not been allowed, there would have been 80 for A. B. and 70 for G. H. But the affidavits on the other hand stated, that the first person to whom the objection, if any, applied, who proffered his vote at the election, tendered it for A. B., and was accepted by the corporation as a good vote, with full knowledge by all the parties present of the circumstances under which the title was registered; and other objections, which were now said to lie against several voters for A. B., were reserved for future discussion. *Per Cur.* The only question of any importance in this case is, whether E. F. was a registrar *de facto* at the time of these registers, made after the death of C. D., & we think he cannot be so considered. We think he must be considered as a deputy-registrar, and a deputy must be presumed to act under the assent and control of his principal; and, as a necessary consequence, after the death of his principal, whose assent can no longer be presumed, his authority is determined.—With respect to an officer *de facto*, the question is, whether he has such a colourable authority, into which the persons who are to act upon it cannot examine, as to induce them to register their deeds with him, or do such acts as he assumes power to do; for an officer *de facto* is one who has the reputation of being the legal and well-authorized officer. But in this case E. F. was never more than deputy; and, therefore, after the death of his principal, he could never have the reputation of being entitled to register deeds, for this reputation must clearly have ceased when it was known that C. D. was dead. Now C. D. died in December, 1804, and the election was not until April the 15th, 1805, and some of these registers were made just previous to the election. As to the case in Moor. 113. it is not an authority for this purpose. That case, where Manwood says, “if one who has colour, but no right, does an act that is good as under-steward, when the steward is dead,” must be understood of one acting before the death of the principal is known; for if that was known, how could he have colour of authority? This doctrine of Manwood’s is indeed no more than was law in respect of all judicial officers.—Rule absolute.

See Com. Dig. tit. Officer, D. 2. cited 9 Rep. 48; 11 id. 4; Plow. 377; 1 Str. 299; 2 id. 1213; 3 Furr. 1821; Sir W. Jones. 311; Cro. Car. 280. 550; 4 Mod. 17; 2 Salk. 465; 1 Ld. Raym. 661; 1 T. R. 396; 2 id. 259; 4 id. 881. 699.

2. HODSON v. SHARPE. M. T. 1808. K. B. 10 East. 350.

The non-compliance with the cause in the Bedford Level Act, requiring leases of land coming within its provisions to be registered, does not avoid such a lease as between landlord and tenant.

This was an action against a lessee of land situated in the Bedford Level, for a breach of covenant in not repairing. Defendant relied, as a defence, upon the fact of the lease not having been registered according to the terms of the Bedford Level Act, (15 Car. 2 c. 17.); which directs (s. 8.) that no lease, &c. of the same (except leases for seven years and under in possession) should be of force, but from the time it should be entered with the registrar, one of the officers named in the corporation, &c. *Sed per cur.* The object of this registry act is, like that of all others, to protect the title of third persons, but not to enable the parties themselves to set it up against their own acts, it being a general rule, that a tenant shall not be permitted to set up any objection to the title of his landlord under whom he holds.—Judgment for plaintiff. See 2 T. R. 743; 5 id. 4; 8 id. 487; 1 East. 244; 2 id. 467.

Breach. See tit. Trees.

Beer and Ale.

1. *REX. v. COOKSON. M. T. 1812. K. B. 16 East. 376.*

The ship-
per of beer
for expor-
tation is en-
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titled to a
draw
back,*
without be-
ing subject
to any de-
duction out
of such
drawback,
in respect
of any
quantity of
such beer
that may
be proba-
bly consu-
med by the
crew of the
vessel in
which it is
shipped.

Rule nisi for a *mandamus* to the collector of the excise at Liverpool, to administer to a shipper of beer, on which the duty had been paid, and which was shipped for exportation to the West Indies, the oath appointed by the 38 Geo. 3. c. 54. s. 4. in order to entitle him to obtain a drawback on such beer. It was objected, that the whole quantity of beer shipped was no more than adequate to the consumption of the crew during the voyage, on which no drawback is allowed. The general question raised was, whether the general shipper of beer for exportation was not entitled to the drawback until the master should have shipped sufficient for the consumption of the voyage, or paid the duty on such quantity. It appeared, that although the point had not before occurred in the port of Liverpool, yet that in the port of London it had been the invariable practice to deduct, in making out debentures, for the drawback on beer exported; a certain quantity for the stores of the ship, and only allow the drawback on the residue. It was contended, that the rule ought not to be made absolute, inasmuch as the establishment of the same practice in the port of Liverpool as existed in the port of London, would obviate fraud, as it would prevent masters of vessels shipping beer, as merchandize for exportation and foreign consumption, in order to get the drawback, and afterwards using it as sea stores. *Per Cur.* The right to the drawback attaches on shipping the beer on board, and cannot be divested by the probability of the master's afterwards using it on board. The excise officers must recover from the master, what he is bound to pay, in respect of the quantity of beer charged in the victualling bill for the consumption of the voyage, or likely to be consumed during the voyage, and may prevent him clearing out until he complies with the regulations specified by the legislature. Rule absolute. See 12 *Car. 2. s. 15. 16. 17*; 1 *W. & M. c. 22.*

*The 43 Geo. 3. c. 69. s. 1. repealed all drawbacks as well as duties of excise in force at the time of passing that act, and substituted others in their stead. Beer or ale, for which the duty has been paid when exported to foreign parts as merchandize, if above 16s the barrel, exclusively of the duty, and not being twopenny ale mentioned in the 7th article of the treaty of Union with Scotland, is entitled to a drawback of 12s. 11d. the barrel; 43 Geo. 3. c. 69; see 56 Geo. 3. c. 108. In order to obtain the drawback, it must be exported and shipped in the presence of a sworn gauger, or other sworn officer appointed by the commissioners of excise, (after notice given at the excise office within the limits of which it was brewed, of the place where it is to be shipped), and the gauger or officer is to certify the quantity shipped off to the commissioners and officers of excise where the entry is made, whose duty it is, after proof that the duties have been charged or paid, to make the allowance or drawback for the same to the brewer, within one month after exportation; 1 Geo. 3. c. 7. Before any drawback is received for beer entered for exportation, in order to obtain the drawback, the brewer or his known servant, or the exporter or his known servant, as the case may require, must take an oath on the debenture before one or more of the commissioners of excise, or before the proper collector, or other officer of excise, stating that the specified number of barrels of strong beer was put on board the vessel and exported therein as merchandize, to be spent beyond the seas, and no part thereof for the ship's use, and that the excise duty has been charged on the beer as strong; 38 Geo. 3. c. 54. s. 4; see 59 Geo. 3. c. 53. s. 15. When the exporter is not the same person as brewed the beer, he must take an oath, that to the best of his knowledge and belief, "the above-mentioned barrels of strong beer were put on board the vessel and exported therein as merchandize, to be spent beyond the seas, and that no part of it was for the ship's use, and that by the officer's certificate it appeared the beer was brewed by E. J. (of such a place), common brewer, and the excise duty charged on the same as strong beer;" 38 Geo. 3. c. 54. s. 4. The officers of customs are to charge every master of any vessel in his victualling bill with such a quantity of strong beer or ale as such a number of men are used to spend in a voyage of the same nature as that on which the ship is bound, in respect of which quantity no drawback is allowed.

The excise duties imposed on beer by the 43 Geo. 3. c. 69. have been increased and varied by the 55 Geo. 3. c. 30; see 56 Geo. 3. c. 113; 48 Geo. 3. c. 143; and there are also several acts to protect this article from the admixture of unlawful and injurious ingredients, as the 1 *W. & M. sess. 1. c. 24. s. 17*; 10 & 11 *W. 3. c. 21. s. 34*; 9 *Anne, c. 12. s. 24*; 12 *Anne, sess. 1. c. 2. s. 32*; 42 *Geo. 3. c. 88. s. 20 to 25*; 56 *Geo. 3. c. 58. s. 2*. The provisions that have been made by the legislature to preserve the purity of beer are liberally construed in our courts of justice in advancement of the objects for which they were enacted.

The price of barley at the port is the rate of the bounty* upon the exportation of strong beer, and not the average price of barley throughout the kingdom.

2. WHITBREAD V. BROOKSHANK. E. T. 1774. K. B. Cowp. 66.

This was a special verdict in an action against an excise officer. It stated, that the plaintiff, after the 24th of January, 1761, brewed from malted corn, and duly exported from the port of London, 6,229 barrels of beer, as merchandize, at different times, from the 6th of June, 1771, to the 15th of September, 1772, when barley was at and under the price of 24s. per quarter at the said port of London, and above the said price of 24s. per quarter, according to the average price of corn throughout the kingdom, as published in the *Gazette*, according to statute 10 Geo. 3. for registering the prices of corn in the several counties of Great Britain, upon which 6,229 barrels of beer the duties were charged and paid; and the said plaintiff claimed to be allowed, by the commissioners of excise, and the said defendant, their proper officer in this behalf, the bounty of 1s. a barrel, amounting to 311l., by virtue of the 1 Geo. 3., which directs such bounty to be allowed on beer exported when barley is at or under the price of 24s. per quarter, and which bounty the said commissioners and the said defendant had refused to allow; and that it was the usage of the commissioners of excise to allow such bounty on beer exported from the port of London, when the price of barley was 24s. per quarter; or under, at the port of London. The question upon the verdict was, Whether the bounty was to be regulated according to the *average price* of barley throughout the *kingdom*, or according to the price at the port of *London*, from whence the beer was exported? *Per Cur.* The law is with the plaintiff. The act 1 W. & M. c. 12. refers to the price at the port, and the usage under it has been uniformly so. Then follows stat. 1 Geo. 3. c. 7. which gives a bounty upon the exportation of beer, to be governed by the price of barley; and the jury find, that the rule by which the excise has governed itself in the allowance of this bounty has been by the price of barley at the port. This rule has continued to the 10 Geo. 3. which was made for a quite different purpose, whether politically or not is a great doubt, but the view was to guide the judgment of the legislature in ascertaining the quantity of corn and grain exported and imported, in order to fix a rule by which the price of corn might be known in all parts, and consequently to render it capable of having an average price fixed; but it does not refer, or apply, to any of the former acts, or make mention of them. Lastly, the 13 Geo. 3. was enacted which regulates the bounty according to the price at the port, but does not say a word about an average price. What then is the ground on which a new construction is to be made? We profess we cannot see. It was very easy for parliament to have said, if they had thought fit, or had adjudged it wise so to do, that the bounty should be regulated according to the average price of corn, &c. We really cannot see the ground upon which the commissioners of excise proceeded.

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3. HOLCOMBE V. HEWSON. H. T. 1810. K. B. N. P. 2 Campb. 391.

A brewer and publican having agreed that the latter should take all his beer of the former, or pay an advanced rent, the plaintiff, the brewer, brought an action of *assumpsit* for the non-performance of this agreement. It was admitted by the plaintiff's counsel, that if it should appear that the beer supplied was not of a fair and merchantable quality, the plaintiff would not be entitled to recover. The plaintiff, after proving that it was made of malt and hops, was about to show, by other publicans who dealt with the plaintiff, that the beer supplied to them was an excellent commodity. But *Lord Ellenborough, C. J.* rejected their testimony, on the ground that the plaintiff might deal honestly with

If a publican and brewer agree that the latter shall supply the former with beer, or pay, &c. the agreement cannot be enforced, unless the publican be supplied with good beer. The quality cannot be proved by showing

* Beer or ale exported as merchandize, when above the price of 16s. the barrel, exclusively of the duties payable in respect thereof, and brewed in Great Britain from malted corn, and whereon the duties for strong beer or ale shall be proved to have been charged or paid, is entitled to a bounty of 1s. a barrel when barley is at 24s. per quarter; 43 Geo. 3. c. 69. sched. C. tit. Beer; 1 Geo. 3. c. 7. s. 6; 42 Geo. 3. c. 38. s. 7; 59 Geo. 3. s. c. 53. Before the bounty is paid, an oath must be taken that the beer was exported as merchandize, and that no part of it was for the ship's use, and that the excise duty has been charged on it as strong beer. 38 Geo. 3. c. 54. s. 4. gives forms of oaths to be taken by the brewer or his known servant, or the exporter or his known servant; 2 Geo. 3. c. 14. s. 4; see 42 Geo. 3. c. 38. s. 19; 41 Geo. 3. c. 91. s. 5; 59 Geo. 3. c. 53. s. 15.

some customers and not with others, and that the defendant might be among what sort of beer was supplied to other customers. The plaintiff, failing to give other evidence of its quality, was non-suited.

4. COOPER v. TURBILL. T. T. 1808. K. B. N. P. Cited in JONES v. EDNEY. 3 Campb. 287.

To an action of replevin, an avowry was pleaded for arrears of an advanced And a pro-
rent, on account of the plaintiff not having purchased the beer sold on the pre-
mise from E. and C. Plea, that E. and C. delivered bad and unwholesome lease for an
beer. Replication, *de injuria sua propria absque tali causa*. At the trial Lord advanced
Ellenborough, C. J. said, I trust I shall see no more provisions of this descrip- rent in case
tion in leases; they are extremely injurious to the public interest and welfare. the lessee
No man is bound to make himself a sacrifice to such a covenant. If the plain- should dis-
tiff had supplied an improper commodity after notice, and material injury had continue
accrued to any of his majesty's subjects, he would have been liable for the con- purchasing
sequences; and if the plaintiff was ill served by his landlord, he was right in his beer of
purchasing beer elsewhere.—Verdict for plaintiff. the lessor,
seems to be
illegal;*

Begg, See tit. *Tithes*.

Beggar, See tit. *Vagrant's Act*.

Behavior, surety for good. See tit. *Peace, sureties to keep the*.

Bell-Man.

HAWKINS v. BUTT. T. T. 1793. K. B. N. P. Peake. 186.

The defendant being indebted to the plaintiff for goods sold, &c. the latter ing that the
requested the former to forward the amount by the post; which he accordingly beer sup-
did; but instead of putting the letter into the box at a receiving house, he gave plied was
it to a bell-man in the street; the plaintiff not having received the letter, brought bad, is a
this action for goods sold, &c.; when it was contended, that the remittance good de-
was payment, it having been sent according to the plaintiff's request. fence.

Sed Per Lord Kenyon, C. J. The plaintiff must recover; it was incumbent on the A debtor is
defendant to have delivered the letter to a receiving house authorised by the not dischar-
general post-office; here it was delivered to a bell-man in the street, which ged by deli-
is a very insecure mode of making a remittance of money, the tempta- vering a let-
tion being very great to a person who is inclined to be dishonest. Had it been ter, contain-
delivered at a proper office, I should have deemed it a good payment. ing a remit-
The verdict must be for the plaintiff. See Warwick v. Noakes. Peake. 67; 7 East. tance to his
creditor, to
a bellman
in the
street.

Bell-Metal, See tit. *Receiver of stolen goods*.

Bells. See tit. *Church*.

Bench-Warrant. See tit. *Warrant*.

Benchers. See tit. *Inns of Court*.

Benefice. See ante, tits. *Advowson*; and post, *Ecclesiastical Persons*; In-
duction.

Benefit Club. See tit. *Friendly Society*.

Benefit of Clergy. See tit. *Clergy benefit of*.

Berlice. See tit. *Insurance*.

Bequest, See tits. *Devise*; *Legacy*; *Will*.

Berwick,†

1 REX v. COWLE. T. T. 1759. K. B. 2 Burr. 834.

On a rule to show cause why a *certiorari* directed to the mayor and corpora- Indict-
tion, and justices of Berwick, to remove an indictment, should not be superse- ments may
ded; the question was, whether the Court of K. B. had jurisdiction over Ber- be removed
wick, where the proceedings were not according to the laws of England, but from Ber-
according to the laws of Scotland. wick by
certiorari.

After hearing counsel, the Court said, there is no doubt as to the power of
this Court, where the place is under the subjection of the crown of England.

*When England is only mentioned in an act of parliament, it includes Berwick; 20
Geo. 2. c. 42. s. 3. Process is directed to the mayor and bailiff's of Berwick; 1 Tidd. Prac
7th edit. 172.

† And where premises are described in the condition of sale as a "free public-house,"
the bargain may be avoided by the vendee if it appear that the lease contain a clause of
that description; Jones v. Edney, 3 Camp. 285. abridged ante, vol. ii. Auction & Auctioneer.

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There is no instance of a doubt having ever been made, before the present case, concerning the authority of this Court to send a writ of *certiorari*, to Berwick; and we are all clearly of opinion, that the court by law has such a power; therefore, the rule to show cause why a *supersedeas* to the writ of *certiorari*, should not issue, must be discharged. See the charters &c. set out at length in the case.

Where the cause of action arises in Berwick and the venue is laid elsewhere, it is not settled whether it can be changed in to Northumberland as being the next adjoining county.

2. MAYOR OF BERWICK. v. EWART. T. T. 1775. C. P. 2. Blac. Rep. 1036.

On a motion to change the venue from *Middlesex* to *Northumberland*. An affidavit, stating that the cause of action arose only in Berwick, was produced and that the question to be tried was upon a custom in which all the free men of Berwick was concerned in interest; the case of the Mayor of Berwick v. Johnston, M. S. was cited, wherein a rule had been made, stating Northumberland to be the next English county to Berwick, and ordering that no writ of error should afterwards be brought in consequence thereof. Upon the authority of this case, the Court granted a rule to show cause; but on the plaintiff's undertaking to give material evidence in Middlesex, the rule was discharged, and the Court did not decide the question. See 2 Ed. 2. 24; 1 Lev. 252; 1 Vent. 59; Sid 331; 2 Show. 365.

Betting at Games. See tits. *Gaming*; *Wager*.

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Bible. See also *post*. tit. *Blasphemy*.

BERKELEY PEERAGE CASE. Dom. Proc. 1811. 4 Camp. 401.

An entry in a bible by a father as to his son's legitimacy, is admissible in evidence after the father's death.

This was a case before a committee of the House of Lords, in order to prove the legitimacy of the claimant to the peerage, (which depended upon the validity of a marriage alleged to have been contracted by his parents in the year 1786.) The following question was, among others, proposed by the committee to the judges: whether, upon the trial of an ejectment respecting Little Acre, between N. and P., in which it was necessary for N. to prove that he was the legitimate son of T., the said T. being at that time dead. N. after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a bible, in which bible T. had made such entry in his own hand-writing, that N. was his eldest son, born in lawful wedlock, from J. the wife of T., on the first day of May, 1778; and signed by T. himself; and it was proved in evidence on the said trial, that the said T. had declared, "that he (T) had made such entry for the express purpose of establishing the legitimacy, and the time of the birth, of his eldest son N., in case the same should be called in question, in any case or in any cause whatsoever, by any person, after the death of him the said T." Held by the judges, unanimously, that such entry in such bible, (or in any other book, or in any other piece of paper,) could be received to prove that N. is the legitimate son of T., as evidence of the declaration of T. in matter of pedigree; (but with strong circumstances of suspicion, on account of its particularity.) See *ante*, p. 177; and 3 Stark. Ev. 1104

Bidder. See tit. *Auction and Auctioneer*.

Bigamy. See tit. *Polygamy*.

Bill in Chancery. See tit. *Chancery, Bill in*.

Bill in Parliament. See tit. *Parliament*.

Bill of Costs. See tit. *Attorney; Costs*.

Bill of Middlesex. See tit. *Middlesex, Bill of*.

Billeting.†

1. READ v. WILLAN. T. T. 1780. K. B. 2 Doug. 422.

In *assumpsit* for hay, straw, and stable corn, found for horses belonging to the defendant. A verdict was found for the plaintiff, subject to the opinion

* But it seems that the Courts, upon a proper suggestion, will order the cause to be tried there; 2 Barr. 859; and the *venire* is awarded to the sheriff of that county.

† By the 31 Car. 2. c. 1. s. 54. no officer, civil or military, nor other person, shall presume to place, quarter or billet, any soldier, or any subject, or inhabitant of this realm, of any degree, quality, or profession whatsoever, without his consent; and every such subject or inhabitant may refuse to quarter any soldier, notwithstanding any command, ed under a order, warrant, or billeting whatever.

Under the contract. By the mutiny act, 5 Geo. 4. c. 13. s. 48. the constables and other chief officers and

of the Court on a case, which stated that the plaintiff was an innkeeper at R., that the defendant was a contractor with the Board of Ordnance for supplying horses for the royal train of artillery, under a contract then subsisting

magistrates of cities, towns, villages, and other places, and in their default or absence, any one justice inhabiting in or near such place, and no other, shall and may, during the continuance of this act, quarter and billet officers and soldiers in inns, livery stables, ale-houses, victualling houses, and the houses of sellers of wine by retail, to be drunk in their own houses, or places thereunto belonging (other than canteens held under the authority of the commissioners for the affairs of barracks, or of the department of the ordnance, and other than persons who keep taverns only, being free of the Vintner's Company in London, notwithstanding such persons who keep taverns only have taken out victualling licences); and all houses of persons selling brandy, strong waters, cyder or metheglin, by retail to be drunk in houses (other than the houses of distillers, who keep places for distilling brandy and strong waters, and who do not permit tipping in their houses); and in no other, and in no private house whatsoever; nor shall any more billets be ordered than there are effective soldiers; which billets, when made out, shall be delivered to the commanding officer present; and if any constable, or such like officer or magistrate as aforesaid, shall presume to billet any such officer or soldier in any private house without the consent of the owner or occupier, such owner or occupier shall have his remedy at law against such officer or magistrate for damages sustained thereby; and if any military officer shall take upon him to quarter soldiers, otherwise than according to this act, or shall offer any menace or compulsion to any mayor, or other civil officer before-mentioned, tending to discourage any of them from doing their duty, he shall, on conviction before any two justices, by the oath of two witnesses, be *ipso facto* cashiered, and disabled to hold any military employment; provided the conviction be affirmed at the next quarter sessions of the county, and a certificate thereof be transmitted to the Judge Advocate, who shall certify the same to the commander-in-chief and secretary at war. And if any person shall be aggrieved by having more soldiers billeted than in proportion to his neighbours, on complaint thereof to one justice of the division where quartered, or if the person so billeting them be a justice, then on complaint to two justices, they may relieve him, by ordering so many of the soldiers to be removed and quartered upon such other person as they shall see cause, and such other person shall receive them accordingly.

Sect. 50. At no time when troops are on a march shall any of them be billeted above one mile from the place or places mentioned in the route.

Sect. 51. Soldiers and their horses on a march are to be billeted in a just proportion upon the keepers of all houses within one mile of the place mentioned in the route, although some of such houses may be in the adjoining county, in like manner as if they were locally situate within such place, but the constable is not to billet or quarter soldiers out of his county, if the constable of the adjoining county shall be present and undertake to billet and quarter the due proportion of men in such adjoining county.

Sect. 54. No justice, having or executing any military office or commission, shall be concerned in quartering, billeting, or appointing quarters for any soldiers under his immediate command; but all things done by him therein shall be void.

Sect. 57. The officers, men, and horses, belonging to his majesty's horse or dragoons, and also bat and baggage horses belonging to any of his majesty's other forces, and also the horses belonging to staff and field officers in his majesty's forces when upon actual service, not exceeding for each officer the number for which forage shall be allowed by his majesty's regulations, shall be quartered and billeted in the inns, livery stables, and other houses in which officers and soldiers are by this act allowed to be quartered and billeted; and they shall be received and furnished by the owners and occupiers of such inns with diet and small beer, and with stables, and hay and straw for such horses, paying and allowing for the same the several rates that are or shall be established by any act in force in that respect.

Sect. 59. The allowance of 4*d.* per week heretofore made to innkeepers or others for each horse billeted on them for the use of the stall when the forage has been furnished by contract, is to continue to be paid only during the time when such horse shall be provided with hay and straw by contract, and not by such innkeepers or other owners or occupiers as aforesaid.

Sect. 60. When any horse or dragoon shall be quartered upon any person who hath no stables, upon his complaint to two justices of the division, and his making such allowance as such justices shall think reasonable, they may order the men and their horses, or the horses only, as the case may be, to be removed and quartered upon some other person who hath stables, and may order and settle a proper allowance to be made by the person having no stables, in lieu of his quartering such horse or dragoons, and order payment thereof to the person to whom the removal is made, or to be applied for the furnishing of quarters for such men and their horses.

Sect. 61. In all places where horse or dragoons shall be quartered or billeted for the future, the men and their horses shall be billeted in one and the same house (except in

[247] with the Board for that purpose ; that five horses, the property of the defendant, and marked with the initials of his name, and with the initials of the king's name, and the crown on the left flank, were billeted on the plaintiff at his inn at R. upon their return from the service of drawing the artillery and ammunition for part of the army at C. camp, under a route received from the case of necessity,) and in no other case whatsoever shall there be less than one man billeted where there shall be one or two horses, nor less than two men where there shall be four horses, and so in proportion for a greater number; and in such case each man shall be billeted as near his horse as possible.

Sect. 62. Exchange may be made by the commanding officer of any men or horses quartered in any place, provided the number of men or horses do not exceed the number at that time billeted on such house ; and the constables shall billet the same accordingly.

Sect. 63. An officer taking money for excusing the quartering shall be cashiered.

Sect. 64. If any high constable, or other officer, or any person whosoever, shall neglect or refuse to quarter any officers or soldiers on duty, provided sufficient notice be given before their arrival, or if he receive, demand, contract, or agree, for any reward, in order to excuse any person from receiving such officer or soldier, or if any victualler, or any other person liable to have any soldier billeted upon him, shall refuse to receive or to afford proper accommodation to, or to victual any such soldier, or shall refuse to furnish or allow the same according to the direction of this act, the several things respectively demanded to be furnished or allowed to non-commissioned officers or soldiers, or to furnish good and sufficient stables, with good and sufficient hay and straw for each horse at the rate established by any act in force in that respect, and shall be thereof convicted by one justice of the county where such offence was committed, on confession or the oath of one witness, he shall forfeit not more than 5*l.*, nor less than 40*s.*, to be levied by distress, which sum shall be applied first to satisfy such soldier for the expence thereby occasioned to him, and the remainder to the overseers of the poor of the parish where the offence was committed.

Sect. 65. Any justice may, by warrant or order under his hand and seal, require any constable, who shall billet any soldier, to give an account in writing to him of the number of soldiers who shall be billeted by him, and the names of persons on whom billeted, together with an account of the street or place where such housekeeper dwells, and of the signs (if any) belonging to their house.

Sect. 66. Any justice at the request of any officer commanding any soldiers requiring quarters, in any case in which it shall appear to such officer or justice that better accommodation can be given to the troops by extending any route, or enlarging the district within such quarters shall be required, may enlarge such route, and extend such quarters as shall be most convenient to the troops to be quartered.

Sect. 67. Officers and soldiers billeted as aforesaid shall be received and furnished with diet and small beer, paying for the same the several rates established by an act in force in that respect; see stat. 5 Geo. 4. c. 31. *post*, p. 381.

Sect. 68. If any person or persons where soldiers be quartered shall choose rather to furnish non-commissioned officers or private men (except on a march, or employed in recruiting, and likewise except the recruits by them raised, for the space of seven days at most), with candles, vinegar, and salt, gratis, and allow them the use of fire, and the necessary utensils for dressing and eating their meat, and shall give notice thereof to the commanding officer, and shall furnish the same accordingly; in such case they shall provide their own victuals and small beer, and the officer who receives their pay shall pay the sums to be payable out of the subsistence money for diet and small beer to them, and not to the persons on whom they are quartered.

Sect. 69. Every officer receiving the pay or subsistence money, either for a regiment or particular troops and companies, or otherwise, shall every four days, or before the troops shall quit their quarters, if they shall not remain so long as four days, settle the just demands of all persons keeping inns or other places where soldiers are quartered, out of their pay and subsistence, before any part of the pay or subsistence be distributed. And if such officer shall not satisfy and pay the same, upon complaint and oath made by two witnesses at the next quarter sessions for the county or city where such quarters were, the secretary at war shall (upon certificate of the said justices before whom such oath was made, of the sum due upon such accounts, and the persons to whom the same is owing) give orders to the agent of the troop or company to pay the same, and charge the same to such officer.

Sect. 70. If any troop or company be suddenly ordered to march, and the respective commanding officers are not enabled to make payment of the sums due for the lodgings of the men and stabling for the horses, every such officer shall, before his departure, make up the account with every person with whom such troop or company may have been quartered, and sign a certificate thereof, which account and certificate shall be transmitted to the agent of the regiment, who shall make payment immediately.

Sect. 71. If any officer, military or civil, shall quarter any of the wives, children, or servants of officer or soldier, in any house against the consent of the owner; if he be an officer, he shall, upon being convicted thereof before a general court martial, be cashiered

commander-in-chief at C. which was produced in evidence; that the horses continued under the same billets for some time, when they were attached to another regiment on actual service. This case involved the question whether the defendant, under the above circumstances, had a right to billet the horses upon the plaintiff in the same manner, and at the same rate, as the horses belonging to the light horse and dragoons are billeted under the mutiny act; 19 Geo. 3. c. 16. *Per Cur.* The question in this case is, whether artillery horses are entitled to be billeted, and we think we are bound to decide in the affirmative. The dragoon horses are not mentioned expressly in the enacting part of the statute, but the horses and men are considered as inseparable. The clause introduced in 1740 is decisive. It mentions particularly the payment of quarters, which must extend to the horses as well as the men employed. The reason certainly extends to them; horses are more necessary for artillery than dragoons, because the artillery cannot possibly be made use of without them. The circumstance of their being hired under a contract does not alter the question.

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2. REX V. CALVART. T. T. 1793. K. B. 7 T. R. 724.

By the 33d section of the 37 Geo. 3. c. 33. it is enacted, that "it shall be lawful for the high constable, &c. within the cities and liberties of Westminster and places adjacent, to billet and quarter the officers and soldiers of his majesty's regiments of foot guards, in such houses only as by this act are limited and if a civil officer, he shall forfeit to the party grieved 20s. on complaint and proof thereof to the next justice, to be levied by distress, rendering the overplus, (if any), after deducting reasonable charges in taking the same.

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The 37 Geo 3. makes no distinction between the foot guards and other troops; the former may therefore, be billeted in any part of the king dom.

By stat. 5 G. 4. c. 31. for fixing the rates of subsistence to be paid to innkeepers and others on quartering soldiers (the act for that purpose being passed annually) and which is to continue in force until the 25th March, 1825; every non commissioned officer and private soldier who shall be furnished with diet and small beer, shall pay for the same the sum of 1s. per diem; and for such allowance the innholder or other person shall furnish one meal, viz. a hot dinner, if required, in each day, to each non-commissioned officer, trumpeter, drummer, or private soldier, quartered and billeted on him, to consist of such quantities of diet and small beer as shall have been or shall be specified by any regulations made by his majesty in that behalf, but not to exceed one pound and a quarter of meat previous to being dressed, one pound of bread, one pound of potatoes or other vegetables previous to being cooked, and two pints of small beer, and vinegar, salt, and pepper, and the accounts of the same shall be rendered, and payment thereof made, as is directed by the mutiny act.

Sec. 2. Where the innholder shall furnish the articles specified in the mutiny act, in lieu of diet and small beer, he shall have one halfpenny per day for each noncommissioned officer and soldier.

Sec. 3. Tenpence per day is to be paid for each horse for hay and straw.

Sec. 4. All noncommissioned officers and soldiers shall receive their diet and small beer at the above rates while on the march, and on and for the day of arrival at the place of their final destination, and on the two subsequent days, unless either of the two be a market day for the place where billeted, or within two miles thereof, in which case the innkeeper may discontinue on and from such market day the diet and small beer, and furnish in lieu thereof the articles in the said act specified, and at the rate in this act prescribed.

Sec. 5. If any person liable to have soldiers quartered on him shall pay any sum to any noncommissioned officer or soldier on the march in lieu of the diet and small beer, he may be proceeded against and fined as if he had refused to furnish the things to be provided by him.

Sec. 6. The provisions of section 4 are extended to halting on a march.

Sec. 7. But if it appear by the marching orders that the halt is not intended for a longer time than one day after the day of arrival, and the day after such arrival be market day as aforesaid, there is to be no discontinuance of diet and small beer.

Sec. 8. Noncommissioned officers and private men employed in recruiting, and the recruits by them raised, shall, while on the march, and for two days after the day of their arrival at any recruiting station, be enlisted to the same benefit as before provided for troops on the march; but no recruit entitled after the two days subsequent to the arrival of the party at their recruiting station, shall be entitled to be supplied with diet and small beer at the rates herein before prescribed, except at the option of the person on whom quartered; provided, that in any case any recruiting party, with the recruits by them raised, shall remove from their station, and after a time shall return to the same place, they and the recruits shall not be again entitled to the diet and small beer for two days; unless their time of absence exceeded 28 days,

ited in and about the city and liberties of Westminster, and places adjacent, &c. One A. B. in a regiment of foot guards, being billeted on the defendant, a stable-keeper who was resident in the parish of St. Pancras, refused to receive A. B. on the ground that St. Pancras was not in the liberties of Westminster, nor adjacent thereto; the defendant, having been brought before a justice, was convicted in the penalty directed by the act. And the Court were of opinion that the conviction was legal, on the ground that the mutiny act regulating the billeting of troops, made no distinction between the foot guards and other troops, it only requiring that when the former are quartered in London, Westminster, and the parts adjacent, the billeting shall be in the mode therein prescribed; therefore the guards may be billeted in any part of the kingdom, as well as other troops.

A high constable or a deputy may billet soldiers under the mutiny act.

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3. MIDHURST v. WAITE. M. T. 1761. K. B. 3 Burr. 1260. S. C. 1 Blac. 350. Upon a motion for a new trial, it appeared that this was an action by an ale-house-keeper against a deputy high constable, for billeting soldiers upon him; and that the high constable, living at a distance, had appointed the defendant as his deputy by parol only, and to manage the business of quartering soldiers for him during his continuance in office. The questions were, 1st, Whether a high constable be a common law officer? 2d, Whether a high constable comes within the word "constable" in the annual mutiny act, so as to empower him to billet soldiers? And, 3dly, Whether a high constable can appoint a deputy for this purpose? The judge who tried the cause was of opinion, at the trial, in the affirmative of all these points, and the Court, after argument, concurring, the rule for a new trial was discharged.

4. PARKHURST v. FOSTER. T. T. 1699. K. B. 1 Lord Raym. 479; S. C. 5 Mod. 427; S. C. 1 Salk. 387; S. C. Holt. 366; S. C. Carth. 417.

But if he billet a soldier on a person not liable to receive him, he is liable to an action

In an action of trespass, on a special verdict, it was found that the plaintiff was a housekeeper at Tunbridge, and let out lodgings to strangers, and also furnished them with stable room for their horses, &c. and the defendant, being a constable, quartered a dragoon at the plaintiff's house, for doing which an action was brought. The question before the Court was, whether the defendant was subject to an action for the improper burden he had cast upon the plaintiff. *Per Cur.* If a constable places a dragoon where it is unlawful for him so to do, he must make satisfaction for the consequential damages; for example, if the dragoon should, out of a frolic, let the drink about the cellar, or do any other prejudice, the constable is answerable for all the damage that ensues; for since the placing him there was unlawful it shall be taken as if the constable had placed him there on purpose to do an unlawful act.—Judgment for the plaintiff. See this case fully abridged, ante, vol. i. p. 455.

Bill of Exceptions. See tit. Exceptions, Bill of.

Bill of Health.* See post tit. Quarantine.

LEVY v. COSTERTON. H. T. 1816. C. P. N. P. Holt. 167.

The master of a ship hired for a voyage to the Mediterranean, is bound to provide a bill of health.

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A charter party on a ship hired for a voyage to the Mediterranean, stipulated that she should be "tight, staunch, and strong and well and sufficiently manned, tackled, apparelled, and furnished with *every thing needful and necessary* for such a ship, and for the voyage therein after mentioned;" the breach assigned in an action of covenant by the freighter against the owner of the ship, was, that a bill of health was needful, and had not been supplied. It appeared that such a document was not necessary for ships clearing outwards at the custom house here, nor required by our laws to be taken by ships sailing to the Mediterranean; but that by the laws of Sardinia, a regulation well known to persons engaged in the Mediterranean trade, a bill of health was required from all ships, even from England; and without one they are obliged to per-

* This is a certificate properly authenticated, that the ship comes from a place where no contagious distemper exists, and that none of the crew at the time of her departure were infected with any disorder. A bill of health is generally found on board of ships coming from the Levant, or from the coast of Barbary, or other places where the plague frequently prevails; *Beawes. Lex. Mer.* 6th edit. vol. i. 269; *Pope on Customs* title 7; post. tit. Quarantine.

form quarantine— Upon the arrival of the vessel in question at Cagliari, she was put under quarantine for want of such a document, and the voyage there by delayed.

Gibbs, C. J. held that as a bill of health was a necessary document for such a voyage, it was within the covenant. It was not essential to the question that such a paper was not a ship's paper within the laws of this country, it being necessary for the port whither the ship was sailing, and the captain having stipulated to provide *all such necessities*, it was of course within such a contract. The words *needful and necessary* for a voyage, oblige the defendant to have on board every paper required to advance or facilitate the voyage.

Bill of Middlesex. See Middlesex, Bill of.

Bill of Parcels. See tit. *Frands, Statute of.*

1. SPAWFORTH v. ALEXANDER. H. T. 1798. K. B. N. P. Peake. 621.

In debt *qui tam* under the 35 Geo. 3. c. 55. for not having given a receipt stamp on the payment of money. It was proved, that the defendant and one A. B. had been in the habit of dealing together, and that upon the settlement of an account for 2*l.* 12*s.* A. B. paid the defendant and desired a receipt, but instead of giving one he wrote *settled* on the bill of parcels, and signed his initials. On the question whether this was a receipt within the meaning of the act, *Lord Kenyon, C. J.* said no particular form of words was necessary, to make a receipt, since it was sufficient if it purported to be a discharge. Verdict for the penalty. See post, tit. Receipt Stamps.

2. SMITH v. KELLY. H. T. 1803. K. B. N. P. cited Peake. 25. note.

The defendant offered in evidence a bill of parcel of the goods delivered, to which was subscribed the following words; *settled by two bills, one at nine and the other at twelve months*; and *Lord Ellenborough, C. J.* held this such an acquittance as could not be received in evidence until stamped.

3. *Rex v. Thompson.* 1801. Old Bailey, 2 Leach. C. L. 910.

This indictment for forgery, charged that the prisoner did forge, &c. a certain receipt for money, to wit, for the sum of 1*l.* 1*s.* 6*d.* which said false, forged, and counterfeited receipt for money, is as follows, that is to say, *settled, J. M.* The indictment contained other counts describing it as an acquittance. It was objected on behalf of the prisoner, that the indictment should have shown by proper averment, according to the determination in *Hunter's case*, that this was a receipt for money; 2 Leach. C. L. 624; S. C. 2 East, P. C. c. 19. s. 26. For the prisoner it was contended, that as the stamp act 25 Geo. 3. c. 55. s. 7. had enacted that every note, memorandum, &c. signifying or denoting any debt account or demand, being paid, *settled*, &c. should be deemed and taken to be a receipt, within the meaning of the act; the necessity of averring such an instrument as the present to be a receipt, was removed away. But the Court held, on the authority of *Hunter's case*, that the indictment was bad. See *Rex v. Harvey, R. & R. C. C.* 227.

Bill of Particulars. See post, tit. *Particulars of Demand.*

Bills of Exchange* and Promissory Notes.†

See also tits. -

These are negotiable securities adopted in all commercial states, as the symbol or representative of money, or other tangible wealth. They were first introduced into general mercantile use towards the termination of the thirteenth century. At that period the Jews, from the rapacious exactions to which they were exposed, from the persecuting and intolerant spirit then existing in England and France, were compelled to abandon those countries, and to endeavour to procure a less perilous and more tranquil asylum in Lombardy, and other parts of the Continent of Europe. The general and extended dispersion of this expatriated race, created an urgent necessity of preserving a profound secrecy as to all their pecuniary transactions, and imposed the incidental obligation of inventing some mode of conveying the value of their commodities, without being exposed to the inconvenience of transporting the precious metals, or bartering one unportable article for an equally cumbersome equivalent. The earliest expedient was to transmit confidential letters to those with whom they had entrusted their property, directing the manner in which the proceeds should be applied, relying on their correspondents' honour for the punctual execution of their wishes. These letters gradually became more and more laconic, and finally assumed a fixed form and had conferred on them the name by which they are now known, and became,

If a tradesman write *settled* under his bill of parcels, and put his initials;

Or subscribe the words *settled by two bills, the one at nine and the other at twelve months*, he incurs a penalty for giving a receipt without a stamp

But where, to a bill of parcel, the prisoner forged the word *settled*, it was held, that as this did not, on the face of it, purport to be a receipt for money, the indictment could not be sustained,

Banker, *ante*, vol. iii. p. 379. Bankers Cash Notes, *ante*, vol. iii. p. 392, Bank Notes, *ante*, vol. iii. p. 394. Check, Composition with Creditors-Donato Mortis Causa, Forgery, Gift, Guarantee, Money paid, Money had and received, Partners, Payment, Principal and Agent, Settlement, Uusry, Warranty.

as commercial confidence increased, an open instead of a secret letter of request from one person to another, requiring him to pay, on the writer's account, a sum of money therein mentioned, to a third person.

The utility of a bill of exchange may be thus briefly exemplified; suppose A. live in Jamaica, and owe B., who lives in England, 1000*l*.; now, if C. be going from England to Jamaica, he may advance B. this 1000*l*. and take a bill of exchange drawn by B., in England, upon A., in Jamaica, and receive it when he arrives there; thus B. receives his debt at any distance of place by transferring it to C., who carries over the value of his money in paper credit, without the risk of robbery or loss; 2 Bl. Com. 466.

Bills of exchange are foreign or inland; foreign, when drawn by a person abroad; and inland, when both the drawer and the drawee live in this kingdom. As the object of foreign bills was originally merely for the purpose of commerce, it was formerly thought that they were only valid as between merchant strangers and English merchants; but it was at length established, that all persons, whether traders or not, might be parties to such instruments.

It seems that inland bills were not in use in this country at a much earlier period than the reign of King Charles the Second; and like foreign bills, it was once thought that they could only be made available between merchants; 6 Mod. 29, and bills payable to bearer were at first thought not to be negotiable; but these distinctions have long been held to be without foundation; and, as observed by Mr. Justice Blackstone, although formerly foreign bills of exchange were more favorably regarded in the eye of the law than inland, as being thought of more public concern in the advancement of trade and commerce; yet now by various judicial decisions, and statutes the 9th and 10th W. 3. c. 17. and the 3d & 4th Ann. c. 9. inland bills stand nearly on the same footing as foreign; and what was the law and custom of merchants with regard to the one, and taken notice of as such, is now, by these statutes, enacted with regard to the other. There are, however, still some distinctions between foreign and inland bills; the former, when made abroad, need not be stamped, and must be protested when dishonoured, and may be accepted by parol, or by writing on another paper; whereas an acceptance of an inland bill must, since a recent act of parliament, be in writing on the face of the instrument.

The parties to these instruments are generally four, two at the place where the bill is drawn, and two at the place of payment; as where A., a merchant of Amsterdam, owes money to B. a merchant in London, instead of sending money in specie to B., he applies to C., another merchant at Amsterdam, to whom D., a fourth person, residing in London, is indebted to an equal amount; A. pays C. the money in question, and receives from him a bill directed to D. to pay the amount to B., or to any one appointed by him, who sends it to his correspondent B., with an order that the money be paid to him by D.

But it frequently happens that only three people are concerned; as where A., residing at Amsterdam, and wishing to remit money to B., at London, for goods bought of him, and having C., a debtor, also at London, addresses his bill to the latter, desiring him to pay the sum mentioned to B., or to his order, to whom he then sends it by letter.

There may also be only two parties in the formation of a bill; as where the person making it desires another to pay to himself or to his order.

The person making the bill is called the drawer; the person to whom it is directed, the drawee; and the person in whose favour it is made, the payee. When the drawee has undertaken to pay the bill, he is styled the acceptor; and his undertaking to pay the bill, is called an acceptance. Bills of exchange payable to order are assignable by indorsement. The person making an indorsement is called the indorser; the person in whose favour it is made, the indorsee; the party in possession of the bill, and entitled to receive its contents, the holder.

† As commerce advanced in its progress, the multiplicity of its concerns, required, in many instances, a less complicated mode of payment than by bills of exchange. A trader, whose situation and circumstances rendered credit from the merchant and manufacturer who supplied him with goods, absolutely necessary, might have so limited a connection with the commercial world, that he could not easily furnish his creditor with a bill of exchange on another; but his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader; hence promissory notes were invented.

A promissory note may be defined to be an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer generally. On their first introduction they were considered only as written evidence of a debt; for it was holden, that a promissory note was not assignable or indorsible over, within the custom of merchants, to any other person, by him to whom it was made payable; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed

1. RELATIVE TO THE FORM OF A BILL.

- (A) As to ITS BEING IN WRITING p. 26.
- (B) — THE MODE OF EXPRESSION, p. 264.
- (C) — PLACE WHERE MADE, p. 266.
- (D) — DATE, p. 266.
- (E) — TIME, p. 268.
- (F) — REQUEST TO PAY, p. 268.
- (G) — WHOM PAYABLE, p. 268.
- (H) — BEING PAYABLE TO ORDER, p. 273.
- (I) — THE SUM, p. 275.
- (J) — ITS BEING PAYABLE FOR MONEY ONLY. p. 275.

or assigned over could not maintain an action within the custom, against the person who first drew and subscribed the note, and that within such custom, even the person to whom it was made payable could not maintain an action. But at length they were recognised by the legislature, and the same privileges conferred on them as upon inland bills of exchange, by the stat. 3 & 4 Anne. c. 9. which enacts, "that from the 1st May, 1705, all notes in writing made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually intrusted by him, her, or them, to sign such promissory notes by him, her, or them, whereby such person or persons, body politic or corporate, his, her, or their servant or agent as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, to his, her, or their order, or to bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also, every such note shall be assignable or indorsible over in the same manner as inland bills of exchange, and that the person, &c. to whom such sum is by such note made payable, may maintain an action for the same, in the same manner as they might do on an inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who or whose agent signed the same, and that any person, &c. to whom such note is indorsed or assigned, or the money therein mentioned, ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the person, &c. who or whose agent signed such note, or against any of the persons who indorsed the same. in like manner as in cases of inland bills of exchange."

Having exhibited the origin and general form of these two important securities, it may be useful, before concluding this note, briefly to examine and illustrate the two leading properties of such instruments, and what peculiar characteristics distinguish them from every other species of contract or agreement.

First, that although bills and notes are *choses* in action (that is, the interest in a contract or right, which, in case of opposition, can only be reduced into beneficial possession by an action or suit,) yet they may be assigned so as to vest the *legal* as well as the equitable interest therein in the indorsee or assignee, and entitle him to sue thereon in *his own name*. See *post*, *Choses in Action*.

This right of transfer is in direct opposition to the established rule of law, that a *chose* in action cannot be transferred by the creditor or claimant to a third person, so as to vest the legal interest in the latter or enable him to sue in his own name. The principle of this rule is, that it would tend to increase maintenance and litigation if the assignment to a stranger of a right not reduced into possession were permitted, and that it would afford means to powerful men to purchase rights of actions, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them; Co. Litt. 214. 265. a. n. 1. 223. b. n. 1; 2 Roll. Ab. 45. b. The rigour of this technical rule is, however, in some degree modified, and it is now established, that bonds and other *choses* in action may be so far assigned, as to vest the beneficial interest in the assignee, and preclude the obligor or other debtor, after notice, from paying the assignor; still the legal interest, in such cases, continues in the assignor, and the action upon the security must be brought in his name; and whatever objection would defeat his claim, will equally affect the assignee; 4 T. R. 340; *post*. tit. Bond. Set-off.

Secondly, although bills and notes are not a speciality but merely a simple contract, yet a sufficient *consideration* is implied from the nature of the instrument, and its existence in fact is unnecessary to be proved in general evidence; and the defendant is not at liberty to prove that he received no consideration, unless in an action brought against him by the person with whom he was immediately concerned in the negotiation of the instrument, or by a person who has given no value for it. In this respect a bill or note, although not a speciality, carries with it the same presumption of a consideration as a bond or other instrument under seal. But it is not owing to the form of a bill or note, nor to the circumstance of the undertaking being in writing, that the law gives it the effect of a speciality; but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities. But in order to entitle bills or notes to these privileges, they must be strictly framed according to the law of merchants and the stat. of Anne, and contain all the essential requisites; and if any of these be wanting the common

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- VI. RELATIVE TO THE CAPACITY OF THE CONTRACTING PARTIES TO A BILL OR NOTE.**
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- law rule against the assignment of *choses* in action, and which requires a consideration, will preclude the holder from recovering.
 A bill or note is in general a preferable security to a formal guarantee, and in some cases it is better than a bond; see *Chit. on Bills*, 8.

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- (F) MARRIED WOMEN, p. 324.
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(D) WITH REFERENCE TO THE MODE IN WHICH IT IS TO BE MADE.

(a) By implication, or by a separate instrument, p. 362. (b) — writing on the bill itself, p. 370.

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(a) When absolute, p. 370. (b) — conditional, p. 371.

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(A) AS TO ITS BEING IN WRITING.

THOMAS v. BISHOP. M. T. 1733. K. B. Ca. Temp. Hard. 2.

Per Lord Hardwicke, C. J. A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and *must be in writing*. See 2 Geo. 4. c. 70.

A bill of exchange must be in writing.

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(B.) AS TO THE MODE OF EXPRESSION.

1. MORRIS v. LEE. T. T. 1711. K. B. 2 Lord Raym. 1397; S. C. 1 Stra. 629; 8 Mod. 364.

Per Cur. There are no precise words necessary to be used in a promissory note, or a bill of exchange. See Rast. Ent. 338; 10 Mod. 287; 3 Wils. 213; 2 Stra. 706; 1 Esp. 129; Willes, 396.

2. RUFF v. WEBB, E. T. 1794. 1 Esp. 129.

Assumpsit for work and labour; defence that the plaintiff had taken in payment of his debt a draft on an unstamped slip of paper in the following words: "Mr. N. will much oblige Mr. W. by paying to J. R. or order, 20 guineas on his account."

To constitute a bill of exchange no precise form or set of words is required.*

Lord Kenyon decided, that as this instrument was a bill of exchange, it could not be given in evidence without a stamp; and that such a draft although taken without objection by the party, was not any discharge of the antecedent debt.

A memorandum in these words

"N. will much oblige Mr. W. by paying to J. R. or order, 20l. is a bill of exchange.

3. SHUTTLEWORTH v. STEPHENS, T. T. 1808. N. P. 1 Campb. 407.

This was an action upon an instrument described in the declaration as a bill of exchange drawn by defendant on A. and Co. payable to B. and indorsed by him to plaintiff; the following is a copy of the document produced in evidence:

And an instrument made payable at a particular place, in stead of being addressed to the drawee; but in other respects, like a bill may be described as such.

"21st October 1804.

"Two months after date pay to the order of B. 70l., value received.

"At A. and Co."

Thomas Stevens. T.

* But with a view of rendering the abridgment of the cases decided upon bills of exchange more intelligible, and to prevent any mistake in the formation of these instruments, precedents of a foreign and inland bill are here inserted.

Foreign Bill.

London, 1st January, 1826.

Exchange for 10,000 *Livres Tournoises*.

At two usances (or "at sight," or "after date,") pay this my first bill of exchange (second and third of the same tenor and date not paid), to Messrs. or order, ("or bearer,") ten thousand livres *tournoises*, value such.

received of them, and place the same to account as per advice, from

To Mr. payable at

in Paris, }

James Oatland.

Inland Bill.

£100

London, 1st January, 1826.

At sight (or "on demand," "at after date,") pay to Mr.

days after sight," "at or order ("or bearer,") one

hundred pounds, for value received.

To Mr.

merchant, }

Samuel Skinner.

Bristol, payable at

Lord Ellenborough. The holder certainly might have treated this instrument as a promissory note or a bill of exchange. at his election, but I think it has been properly described in the declaration; as the latter, for A. and Co. may be considered the drawees.—Verdict for plaintiff. See 3 Moore. 91.

4. ALLAN V. MAWSON. M. T. 1814. N. P. 4 Camp. 115.

Action against the defendant as drawer of the following instrument.

“Bradford, August 2, 1814.

“Two months after date, pay to M. A., or order, 110*l.*, value received.

G. M.

“At S.’s Bankers, London.”

Plaintiff presented it for acceptance, and on its being refused, gave defendant notice of dishonour, and brought the present action. The question was, whether plaintiff had a right to treat the instrument as a bill of exchange. Plaintiff’s counsel relied upon Shuttleworth v. Stephens, *ante*, 265. Defendant’s counsel offered to prove that at the place where drawn such instruments were considered as promissory notes; and he contended that the security was not drawn upon S.; it was merely to be paid at S.’s and Co.; the instrument, therefore, had none of the essential requisites of a bill of exchange.

Gibbs, C. J. was of opinion. on the authority of the case cited, that the plaintiff would have had a right to treat the instrument as a bill of exchange, had the word “at” been distinctly written; but he said he would leave the jury to determine whether it was fraudulently written, in small characters, to escape detection, and to induce belief that the instrument was a bill of exchange. Evidence of such instruments being considered as promissory notes where drawn was clearly inadmissible. The jury found the “at to have been inserted with a fraudulent intent.—Verdict for plaintiff. See 3 Moore. 99,

(C) AS TO THE PLACE WHERE MADE.

It is usual and proper to insert in the bill the place where made; but with the exception of bills of exchange under 5*l.* and which are included in the clauses in the 17 Geo. 3. c. 30. it is not absolutely necessary to insert such a superscription.

(D) AS TO THE DATE.*

1. DE LA COURTIER V. BELLAMY. M. T. 1684. K. R. 2 Show. 422. S. P. HAGUE V. FRENCH. T. T. 1802. Ex. Ch. 3 B. and P. 173. S. P. COXON V. LYON. 1810. 2 Camp. 306.

Assumpsit on a foreign bill of exchange, payable at double usance from the date. It was alleged that the party beyond sea drew the bill on a certain day, and that the same was presented to and adopted by the defendant. Exception that the date of the bill was not set forth. The Court said that they would intend the bill to have been dated at the time of drawing it.—Judgment for plaintiff.

2. PASMORE V. NORTH. E. T. 1811. K. B. 13 East. 517.

The defendant on the 4th of May, 1810, drew a bill for 200*l.* on Brook & Co. dated the 11th May, 1810, payable to order, 65 days after date. On the 5th of May, Totty indorsed this bill to the plaintiff for a valuable consideration, and on the same day died. After the 4th, and before the 11th of May, the defendant received effects of Totty’s to the amount of about 130*l.* to answer this bill. On the 12th of May, the defendant advised the drawees of the bill having been drawn, and of Totty’s death, and desired them not to accept or pay

* A bill of exchange should regularly be dated on the day it is made; but as the date of these instruments is not an essential part of them, any more than the date is the substance of a deed, the want of a date, or a false or impossible day being superscribed, will not affect the validity of the contract; Goddards, 2 Co. 5. a; and from Drury v. De Fontaine, 1 Taunt. 131. and other authorities, abridged *post*, tit. Sunday, there seems to be no objection to a bill being dated on the sabbath day.

† Or if necessary to be inquired into, the time will be computed from the day it was issued: see 2d Ld. Raym. 1076; Bac. Ab. Leases, 1; Com. Dig. Fait. B. 3; and Downes v. Richardson, *supra*.

And more particularly if the word *at* is designedly written small, for the purpose of deception.

In an action on a bill, if the date be omitted the Court will intend it dated at the time it is stated to have been made.†

[267] And a bill where the post dating would not be affected by the stamp laws may be dated on a day subsequent.

the bill. Acceptance and payment were accordingly refused, and this action was brought against the drawer; a verdict was found for the plaintiff's subject to the opinion of the Court of King's Bench on a case reserved. The Court after adverting to the 17 Geo. 3. c. 30. as to bills for less than 5*l.* and to the 48 Geo. 3. c. 148. as to post dating drafts upon bankers, held clearly that the plaintiffs were entitled to recover for the whole amount of the bill, and he had judgment accordingly. See *Allen v. Keeves*, 1 East, 435. abridged post, tit. Check.

3. *DOWNES v. RICHARDSON*. E. T. 1822. K. B. 5 B. & A. 674; S. C. 1 D. & R. 332.

Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill, and it was afterwards transferred for value to A. B. Previously to its being so transferred, its date had been altered. The question was, whether a fresh stamp was not necessary in consequence of such an alteration. *Per Cur* The stamp act requires that a bill shall be stamped before it issues; But many different cases have laid down this rule, that if an alteration is made by parties who consent to it before the bill issues, then the alteration does not make a new stamp necessary. The simple question therefore is when this bill is to be considered as having issued. That must be when it is sent into the world for a valuable consideration. An accommodation bill such as this cannot be said to be issued until it is in the hands of some person who is entitled to treat it as a security available in law.

(E) AS TO THE TIME.

COLEMAN v. COOKE. H. T. 1742. C. P. Willes, 396.

Per Willes, C. J. I put a question to the counsel which will, I think, determine the point, whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable, they are not good, and it was admitted by the counsel, that they could find no such rule and I am sure I can find none. If a bill of exchange be made payable at ever so distant a day, if it be a day that must come, it is no objection to the bill.

(F) AS TO THE REQUEST TO PAY.

Any words which import a desire or wish that the drawee should pay the bill when it arrives at maturity suffice. See *ante*, 265.

(G) AS TO WHOM PAYABLE.

1. *GIBSON v. MINET*. H. T. 1791. C. P. 1 H. Bl. 609.

Eyre, C. J. If I put in writing these words, "I promise to pay 500*l.* on demand, value received," without saying to whom, it is waste paper. If I direct another to pay 500*l.* at some day after value received, and do not say to whom, it is waste paper. See *Blanckenhagen v. Blundell*, 2 B. & A. 417. abridged post.

2. *CRUTCHLY v. CLARENCE*. M. T. 1813. K. B. 2 M. & S. 90.

In an action by the payee of a bill against the drawer, it appeared that the defendant drew the bill in Jamaica, and sent it to England, with a blank for the payee's name; that it was put into negotiation here, and afterwards paid to the plaintiff for an old debt without the blank being filled up; and that he inserted his own name as payee: the plaintiff had a verdict; and on a motion for a nonsuit or a new trial, the Court held the plaintiff warranted in inserting his own name, for by leaving the blank the defendant authorised any *bona fide* holder to fill it up, and the rule was refused. See *Doug.* 513.

* Provided it be not a bill within the 17 Geo. 3. c. 30. which enacts, that all bills of exchange, or drafts in writing, being negotiable or transferrable for the payment of 20*s.*, or any sum of money above that sum, and less than 5*l.* or on which 20*s.* or above that sum, and less than 5*l.* shall remain undischarged, shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto.

† And if no time is mentioned, it would be payable on demand. It is, however, the constant practice, and always prudent, to express the time of payment in words, and not in figures, clearly and intelligibly; and if the instrument be drawn in one country using one style, and payable in a country using another, it has been observed, that the drawer sometimes makes the date both according to the old and new style; *Kyd.* 8.

A bill is not to be considered as issued until it is in the hands of some one who is entitled to make a claim thereon.

No time is limited respecting which a bill must be made payable.†

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A bill not stating to whom it is to be paid is inoperative.

And therefore a bill issued without the name of the payee, may be filled up by any *bona fide* holder with his own name, though not originally a party concerned.

Or a bill may be made payable to bearer.

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The *bona fide* holder of a bill of exchange may recover the amount from the acceptor in an action for money paid, or had and received, although the defendant and others drew on the defendant, and made it payable to a fictitious payee.

And such an action may be supported, although there is no evidence to prove that the defendant had received any value for the bill.

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And it has since been holden, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Hence, where a bill of exchange was payable to a fictitious payee, or order, and

3. GRANT v. VAUGHAN. T. T. 1664. K. B. 3 Burr. 1526. NICHOLSON v. SELDNITH, E. T. 1696. K. 3 Salk. 67; S. C. 1 Ld. Raym. 180.

Wilmot, J. When a negotiable note is payable to bearer, an action may clearly be brought in the name of the bearer. Bearer is *descriptio personae* and a person may take by that description as well as any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it (whether it be a note or bill of exchange;) and it is repugnant to the contract that the drawer should object that the bearer has no right to demand payment from him.

4. TATLOCK v. HARRIS. E. T. 1789. K. B. 3 T. R. 174.

The defendant and others drew a bill of exchange on the defendant alone in favour of a fictitious payee, and the defendant accepted it; and having indorsed it with the name of such fictitious payee, delivered it to A. to whom he was indebted, and who gave defendant credit in account for it. A. afterwards indorsed it to the plaintiff for a valuable consideration. In an action against the defendant as acceptor, the Court were of opinion that the plaintiff might recover against the defendant the amount of the bill under the counts for *money paid* and *money had and received*, for the giving of the bill was an appropriation of so much money to be paid to the person who should become the holder of the bill; and therefore, when the plaintiff discounted it, he paid the money to the use of the defendant; and when A. gave the defendant credit for the value of the bill, that was money had and received to the use of such persons as should afterwards be the holder of the bill. See 1 T. R. 654; Say. 223; 3 Burr. 1516; Fort. C. L. 116; Doug. 611; 2 Burr. 1005; Salk. 125; 1 H. Bl. 239.

5. VERE v. LEWIS. E. T. 1789. K. B. 3 T. R. 182.

This was a case similar to the preceding, except that the defendant was not one of the drawers, and there was no evidence that he received any value for the bill, upon which it was urged the plaintiff could not recover upon the money counts. But the Court said the acceptance was evidence that he had received value from the drawers, and the plaintiff had judgment.

6. MINET v. GIBSON. M. T. 1789. K. B. 3 T. R. 431; S. C. 1 H. El. 569.

A bill of exchange was drawn by L. and Co. on the defendants, and made payable to J. W. or order. It was found by a special verdict that J. W. was a fictitious person, that his name was indorsed upon it by L. and Co. that the defendants knew when they accepted the bill that no such person as J. W. whose indorsement was then upon the bill, existed, and that the indorsement was not made by any person of that name; the Court of King's Bench thought this case decided by the preceding decision of Vere v. Lewis, and gave judgment for the plaintiffs; and on a question from the House of Lords, whether the bill might not be deemed in law to be payable to the bearer, *Hotham, Perryn, and Thompson, Barons, and Gould, J.* gave it as their opinions that it might; but *Eyre, C. B.* and *Heath, J.* differed; after which *Lord Kenyon, C. J.*, *Lord Loughborough*, and *Lord Bathurst*, spoke in favour of the judgment, and *Lord Thurlow* against it, and the judgment was affirmed.

7. COLLIS v. EMETT. H. T. 1790. C. P. 1 H. Bl. 313.

The first count of a declaration by the indorsee against the drawer of a bill of exchange stated that the defendant drew a bill directed to L. and Co. by which he required them to pay to G. C. or order, 1551*l.* value received; and delivered the said bill to them, and authorised them to negotiate and indorse the same in the name of G. C.; the plaintiffs then averred that there was no such person as G. C. but that the said name was merely fictitious. One A. G. accepted, and L. and Co. indorsed G. C.'s name on the bill, who appointed the contents to be paid to the plaintiff. Second count alleging the bill so drawn by defendant on L. and Co. who were thereby requested to pay to G. C. or bearer, and averred that the plaintiffs were, and still continued, the bearers and proprietors of the said bill. There were also the money counts. On the general issue being pleaded, a special verdict found, among other things, that the defendant wrote his name upon a piece of blank paper, with a shilling stamp there-

on, and delivered it to L. and Co. payable at such a time, and to such person or persons, as they should think fit. After argument the Court said, that as the first count of the declaration differed from the verdict in two or three material circumstances, that count could not be supported; and therefore they must look to the second, upon which the verdict might be sustained, it stating it to be a bill payable to bearer, which was its legal effect; though it was not *litera-tem* payable to bearer, it being drawn payable to G. C. or order; for a bill is an authority to pay pursuant to the order of the payee, and implies an undertaking to pay pursuant to that order. But if there be no person who, by any possibility, can give such order, the engagement must be to pay the bill. If the order of the person cannot be procured, and, with the knowledge and privity of the parties who make the bill, such a name is put in as cannot give an order, it is in effect the same thing as if they had it made payable to the person who holds the bill; namely, the bearer.—Judgment for plaintiff.

8. GIBSON v. HUNTER. E. T. 1794. Dom. Proc. 2 H. El. 288.

At the trial of this cause, the defendants tendered a bill of exceptions to the judge's direction to the jury, which, after stating the bill with the indorsements, marks, and figures, was in substance as follows: that the plaintiff proved

that the name of N. H. purporting to be subscribed to the paper writing, or bill of exchange, was of the proper hand-writing of N. H. as the drawer of the same; and as the agent of L. and Co. and was accustomed to draw bills of exchange for them, in his own name, as their agent, and that N. H. resided at Falmouth; that no such person as W. F. the supposed payee, ever existed, and that the name of W. F. was merely fictitious; and that the paper writing so subscribed by N. H. and before the same was indorsed with the name of A. G. by procuration of L. and Co. and also before the letters and figures, No. 2063, and the letters G. & S. were subscribed thereto, was sent by L. and Co. being the same persons mentioned in the said indorsement, to the said defendants for acceptance, who accordingly accepted the same by subscribing thereto the said letters and figures, No. 2068, and also the letters G. & J. as the initials of their respective names; that the indorsement of the name of W. F. was made by a clerk of L. and Co. whose name was not W. F. and the said bill was afterwards indorsed with the words, by "procuration of L. and Co. A. G., by the said A. G. a clerk of L. and Co." and delivered by them to the said plaintiff for a valuable consideration then paid to them by the plaintiff, who did not know that the payee named in the said writing was fictitious; and the said plaintiff further showed that the defendants, at the time of their acceptance of the said paper writing, either knew that the name of W. F. contained in the same paper, and indorsed thereon, was a fictitious name; or that defendants had given authority to L. and Co. to draw the same upon them the said defendants, by and in the name of N. H. their said agent expressed therein, to be made payable to the order of a person who did not in fact exist, and whose name was a fictitious name, having a general authority of L. and Co. to draw bills upon the said defendant by and in the name of the said N. H. their said agent, expressed to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; did further prove, that L. and Co. used to send down to H. N. at Falmouth, printed forms of bills of exchange, upon paper duly stamped for that purpose, with blanks therein for the dates, the times of payment, the names of the payees, the sums to be made payable therein, to be signed by him N. H. who used to return the same signed by him to L. and Co. and who then filled up the bills so returned according to their convenience, with dates, the times they were made payable, the payees' names, the greater part of which were fictitious, and the residue real, and the sums for which they were to become payable; and that this was done as the exigencies of L. and Co. required; that when the bills were thus filled up, they were taken to the defendants for acceptance, some of them were so taken for acceptance being indorsed, and others of such bills at the time they were so taken for acceptance having the names of the supposed payees in such bills in-

indorsed in the name of such fictitious payee by agree- ment between the drawer and acceptor, it was holden that an innocent indorsee, for a valuable consideration, might declare on such bill as payable to bearer.

And in an action on a bill of this description against the acceptor, in order to show that he was aware of the payee being fictitious, evidence is admissible of [271] the circumstances under which he had accepted other bills payable to fictitious persons.

[272] done in various kind-writings: that this happened in a great many instances, to the worst of 20,000; that the said bill introduced in evidence, though dated at Falmouth, was not in fact filled up with the true time of payment, the name of the payee, or the sum of money therein mentioned, at Falmouth, but in London. That bills so drawn by N. H. and dated from the same place, were frequently carried at several times on the same day to L. and Co. to the defendants for acceptance: that it requires three days to transmit a bill from Falmouth to London by the post: that in several instances such bills drawn by N. H. as from Falmouth, have been presented by L. and Co. to the defendants for acceptance on the days on which, by the course of the post, the same bill would have arrived if sent on the respective days of their respective dates, but before the hours of the post's arrival on those days, and that they were accepted by the defendants without objection: that in some instances such bills were carried for acceptance after the arrival of the post from Falmouth, and other bills of the like kind, at different times afterwards, on the same day: that in many instances such bills were carried for acceptance on the day on which they were filled up by the said L. and Co. the instant they were filled up, and whilst the ink with which they were so filled up has been wet: that the house of L. and Co. where the said bills were so filled up, was not three minute's walk from the defendant's house; that this was the general course of dealing between L. and Co. and the defendants: that the ink has been apparently so wet at many times when the bills were so delivered for acceptance, that the person who delivered them was careful in carrying them that they might not be smeared; that at the time of carrying them in this manner, it was apparent that the signature of N. H. was dry, and an old writing, and that what had been written to fill up the bills was fresh and wet. That the witnesses, by whose testimony the plaintiff gave the said evidence of the several instances of the manner of presenting and accepting the said bills, had no particular memory to distinguish the bill writing produced in evidence from the rest of the bills presented and accepted by the defendants; that the date of the said bill or paper produced in evidence, the name of the paper, and the sums therein expressed to be payable, were filled up by a clerk in L. and Co., in London, and that was a general course before described with respect to the other bills that were carried to the defendant wet for acceptance. That the defendants' paid bills under these circumstances to a large amount, and for a considerable length of time. The record then stated the objection by the defendant's counsel to the admissibility of this evidence, and the direction of the judge to the jury, that it was proper evidence to maintain the issue on the third count, which considered the bill as payable to *bearer*. The Court of King's Bench gave judgment for the plaintiff, on which the defendants brought a writ of error in the House of Lords; and after argument, the following question was sent for the consideration of the judges: Whether the circumstances mentioned in the bill of exceptions had sufficient relation to the proposition therein also mentioned, viz. that the defendants in the action knew the name of W. F. was fictitious, or that the defendant had given authority to L. and Co. to draw bills upon them, the said defendants, payable to fictitious payees, so that they ought to have been received and left to the jury as evidence thereof? On this question the majority of the judges, together with the lord Chancellor, declared, that they thought that the evidence had been properly received, and left to the jury.—Judgment was affirmed.

9. BENNETT v. FARNELL. M. T. 1807. 1 Campb. 130. 180.

[273] This was an action by the indorsee of a bill payable to a fictitious payee, or his order. Lord Ellenborough held, at *Nisi Prius*, that such an instrument was neither in effect payable to the order of the drawer nor to bearer, but was completely void. It appears, however, from a subsequent part of the same report, that such doctrine is to be taken with this qualification, "unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." A new trial was refused in this case, because no such evidence had been offered at *Nisi Prius*; and Lord Ellenborough said, he con-

ceived himself bound by *Minet v. Gibson*, and the other cases upon this subject, which had been carried up to the House of Lords, (though by no means disposed to give them any extension,) and that if it had appeared that the defendant knew the payee to be a fictitious person, he should have directed the jury to find for the plaintiff.

10. *THE KING v. TAFT*. 1777. 1 Leach. 172; S. C. 2 East. 959.

The prisoner was indicted for forging an indorsement on a bill of exchange, and found guilty; but the judge before whom he was tried submitted the case to the consideration of the judges, upon the following statement. the bill was drawn payable to Messrs. R. & M. and indorsed by them generally, and became the property of one W. W., from whom it had been stolen, the prisoner, for the purpose of getting it discounted, indorsed on it the name of John Williams. The judges were unanimously of opinion that this was a forgery; for although the fictitious signature was not necessary to his obtaining the money, yet it was a fraud both on the owner of the bill and the person who discounted it, and referred to *Rex. v. Locket*, where it was holden, that the forging a name, either real or fictitious, with an intent to defraud, was forgery.

A person fraudulently indorsing a fictitious name on a bill to give it currency is guilty of forgery.

(H) AS BEING PAYABLE TO ORDER.

1. *BANBURY v. LISSET*. T. T. 1744. K. B. 2 Stra. 1211. S. C. *DUCKMAN v. RECKWITH*. M. T. 1691. K. R. Comb. 176.

The plaintiff declared upon the custom of merchants against the defendants, as acceptors of a bill of exchange. The instrument did not require, the drawer to pay the order of the payee, but merely contained a request that the money should be paid to the payee. It was objected that the omission of the words "or order," excluded the bill from the privilege generally allowed to instruments of that description, in which opinion several merchants concurred.

Formerly it was doubtful whether a bill of exchange not payable to order was within the custom of merchants.

1. *HILL v. LEWIS*. H. T. 1707. K. B. 1 Salk. 132; scmb. S. C. 1 Lord Raym. 743.

And altho' its negotiability depends on the insertion of

Exception was taken that a bill was payable to the defendant only, without the words, "or his order," and therefore not assignable by indorsement: and *Holt, C. J.* agreed that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words "or his order," give authority to the plaintiff to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the indorsement of a bill which has not the words "or his order," is good, and as the effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee. See 3 Wils. 211; 6 T. R. 123; 7 id. 243. and may be assigned where the stamp laws do not prevent it, so as to give the assignee a right of action upon it against the assignor but not so as to give him a right against any of the antecedent parties.

[274] words making it assignable; yet it is valid without such words, a bill payable to A's order is the same as if it were made payable to A or order.

3. *HART v. KING*. M. T. 1698. K. B. 12 Mod. 310.—v. *OBMSTON*. H. T. 1715. K. B. 18 Mod. Rep. 287.

Per Holt, C. J. A bill, payable to a party's order, is the same as if it were payable to him or order.

4. *BUTLER v. CRIPS*. T. T. 1702 K. B. 1 Salk. 130; S. C. 6 Mod. 29.

Per Holt, C. J. Pay to me, or order; so much is a bill of exchange, if accepted; and this is the way to make a bill of exchange without the intervention of a third person.

SMITH v. M'CLARE. M. T. 1804. K. B. 5 East. 476; S. C. 2 Smith. Rep. 43. S. P. *FREDERICK v. COTTON*. 2 Show. 8.

Per Cur. In an action brought on a bill payable to the plaintiff's own order, it is not necessary for the plaintiff to allege in the declaration, that he has not made any order for the payment of the bill, nor that he has made

And a bill payable to me or order is valid. And may be declared on, without alleging that A. did not make any order for the payment of the

*The usual words are, "to A. B. or order," or "to A. B. or bearer," or "to the drawer's own order," or "to bearer generally;" see *post*, div. Transfer; and if the words "or order" are omitted, it seems they may be inserted without destroying the effect of the instrument; see *post*, div. Alteration.

any order for the payment of it to himself, for a bill payable to a person's own order is payable to himself; if he does not order it to be paid to any other; and such order not appearing, it will be presumed that none was made. *See* 12 *Mod.* 125; *Cunningham's Law of bills of exchange*, 66.

A bill payable to A. or bearer has been holden not to be with in the custom of merchants.*

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A bill must be for a specific and not an uncertain amount.

But an order to pay so many pounds in the singular instead of the plural number is valid. Bills and notes must be for the payment of money only And in specie.

A promise to pay in cash or Bank of England notes is therefore untenantable The insert ing the words 'value received,' is not essential to

6. *JORDAN V. BARLOE.* E. T. 1700. K. B. 3 Salk. 68. *HODGES V. STEWARD* E. T. 1693. K. B. Comb. 204; S. C. 3 Salk 68; Skin. 346; 12 *Mod.* 26. *S. P. COGG'S CASE.* H. T. 1698. K. B. Comb. 466.

Ruled, that if a bill of exchange be made payable to W. R. or bearer, it is not within the custom of merchants, &c.; and therefore, when, upon such a bill the plaintiff declared, that the defendant being a merchant had drawn a bill according to the custom of merchants, but had not paid the money; the declaration was holden ill.

(1) *As to the sum.*†

1. *SMITH V. NIGHTINGALE.* T. T. 1818. 2 Stark. 375.

Defendant gave Eastling this note, "I promise to pay James Eastling, my head carter, 65*l.* with lawful interest for the same, three months after date, with all other sums that may be due to him." Eastling's administratrix sued thereon. Lord Ellenborough said that it was no note, even for the 65*l.*, but an agreement; and it not having an agreement stamp, nonsuited the plaintiff.

REX V. POST. E. T. 1806. cited *Fayl.* 8. n.

The prisoner altered a note for one pound into a note for ten, by substituting ten for one, before the word "pound," in the body of the note, and also in the corner. It was urged that a note for payment of ten pound, was not a money note. On a case reserved, the judges were clear that it was, and that a capital conviction of the prisoner for forgery was right.

(J) *As to its being payable for money only.*

1. *MASTER V. CHAUNTRY.* T. T. 1747. 2 Stra. 1271.

On error from the Court of C. P., the Court of K. B. held, that a note to deliver up horses, and a wharf, and pay money at a particular day, was not a note within the statute, and reversed the judgment which had considered it as a valid instrument.

2. *ANON.* *Ful. N. P.* 272.

A written promise to pay 300*l.* to B., or order, in three 'good East India bonds, is not a valid note.

3. *Ex parte IMESON.* H. T. 1815. K. B. cited *Bayl.* 7. *S. P. REX V. WILCOX.* E. T. 1808. cited *id.*

Case from Chancery, on the question, whether a country banker was debtor to the holder of certain of their notes, which he had taken from third persons, not from the bank. The notes were for payment, some of five guineas, some of one guinea, "in cash, or Bank of England notes." And after argument, the Court held the bank not debtor to this holder, for these notes were not within the statute; because a delivery of bank notes, which might be of less value than cash, would satisfy them, they were not absolutely, and at all events, for payment of money in specie.

(K) *As to the insertion of the words "VALUE RECEIVED."*

WHITE V. LEDWICK. H. T. 1783. K. B. *Bayl.* 35. 4th edit *MACLEOD V. SNEE.* E. T. 1739. K. B. 2 *Ld. Raym.* 1481; S. C. Stra. 762; 1 *Barnard* 12. S. P. *JENNY V. HEALE.* T. T. K. B. 8 *Mod.* 267; S. C. 2 *Ld. Raym.* 1361; 1 Stra. 591. *CLAXTON V. SWIFT.* M. T. 1685. K. B. 2 *Show.* 495; S. C.

* But this distinction no longer prevails, and a bill payable to A. B. or bearer is indisputably valid.

† The sum should be written in the bill in clear and distinct characters, and the amount superscribed in figures. The latter is a useful precaution, as it may aid an omission in the body of the bill, and cannot occasion inconvenience; as it has been holden, that if the sum in the superscription of the bill be different from that in the body, the sum mentioned in the body will be taken *prima facie* to be the sum payable; *Beawes.* 193.

The 15 Geo. 8. c. 51. interdicts the drawing or making of inland bills payable less than 20*s.*, under the penalty of 20*l.*

3 Mod. 86; 1 Lut. 878. JOSCELINE v. LAFERE. Forts. 282. DEATH T. SER- the validity
WONTERS. Lutw. 889. DAWKER v. LORD DE LORRAINE. 3 Wils 212. BANBU- of a bill.*
RY v. LEESST. 2 Stra. 1212. REES v. THE MARQUIS OF HEADFORT. H. T.
1811. 2 Campb. 574.

Declaration upon a bill of exchange. Demurrer, because it was not stated to have been given for "value received."

Per Cur. It is a settled point, that it is not necessary to insert such words: Judgment for plaintiff. See Hodges v. Steward, Stra. 346; Anon. 12 Mod. 345; Cromlington v. Evans, 1 Show. 5; Vin. Ab. tit. Bills of Exchange, G. 2.

(L.) AS TO THE INSERTION OF "PLACE TO ACCOUNT."

The insertion of these words is unnecessary, although several distinctions have been taken by foreign writers, (Marius, p. 27.) who states, that if the drawer of a bill is himself to be the debtor, then he inserts in the bill these words, "and put it to my account;" but if the drawee, or person to whom it is directed, be the debtor to the drawer, then he inserts the following words, "and put it to your account;" and that sometimes, where a third person is debtor to the drawee, it is expressed in the bill thus, "and put it to the account of A. B.," Chit. Bills, 89.

(M) AS TO THE INSERTION OF THE WORDS "PER ADVICE," OR "WITHOUT FURTHER ADVICE."

These words are frequently not inserted; but when they are they are material and important; for if the bill be payable "as per advice." the drawee cannot pay it without receiving instructions from the drawer to that effect; but if it be payable "without further advice," he may then safely honour it. [277]

(N) AS TO ITS BEING PAYABLE AT ALL EVENTS.

1. RALLI v. SARELL. London Adjourned Sittings after Trinity Term, 1826. 1 D. & D. N. P. C. 33.

Abbott, C. J. said. it is quite settled law, that no bill of exchange is valid unless it is payable *at all events*, and dependant on no contingency.

M'LEOD v. SLEE. E. T. 1727. K. B. 11 Mod. Rep. 400; S. C. Burn. K. B. 12; S. C. 2 Ld. Raym. 1481; S. C. 2 Stra. 762.

J. S., on the 25th of May, 1724, drew a bill on J. N., and directed him, one month after date, to pay A. B, or order, — pounds, as his quarter's half pay, from the 24th of June. 1824, to the 25th of September following. The Court were of opinion that this was a good bill of exchange, for it was *not* payable upon a contingency, nor out of a particular fund, and was made payable at all events, and was drawn upon the general credit of the drawer, not out of the half-pay, for it was payable as soon as the quarter began for the half-pay mentioned in the bill. which was not to be due till three months after. The mention of the half-pay was only by way of direction to the drawee how he should reimburse himself. See other cases collected post.

(O) AS TO BEING PAYABLE OUT OF A PARTICULAR FUND.

1. DAWKER v. THE EARL OF DE LORRAINE. T. T. 1737. C. P. 3 Wils. 207; S. C. 2 Bl. Rep. 781.

The plaintiff declared in *assumpsit* on a bill of exchange drawn in the following words; —

*But if they are omitted, the holder cannot avail himself of the provisions of the 3 & drawn on a 4 Anne. c. 9. s. 4; 9 & 10 Wm. 3. c. 17; which enable the holder of an inland bill or particular note for the payment of 20l. or upwards, to recover interest and damages against the drawer and indorser in default of payment or acceptance; and notes for coals in ships in tain fund. the port of London, must by the 3 Geo. 2. c. 26. s. 7. import to be for "value received in coals," under a penalty of 100l. Such notes, however, have been holden not to be void on account of the omission; per Holroyd, J. 1 Stark, 463. To avoid a variance, these words, it is said, may be inserted at the trial; Bull. N. R.; see Highmore v. Primrose, 5 M. & S. 65. abridged post; Grant v. Da Costa, 3 M. & S. 352. abridged post.

† And not upon an event which may not happen; for it would perplex the commercial transactions of mankind if paper securities were issued into the world incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire at what date these uncertain expectations would probably be realized.

A bill of exchange must purport to be payable absolutely. and at all events.† But an order to pay money out of the drawer's quarter's half-pay, before the pay will be due, is a good bill, because it will be payable, tho' the half pay shall never be come due. A bill must not be

BILLS AND NOTES *Form of Bill*

8th January, 1768. Seven weeks after date, pay to Messrs. R., 32*l.* 17*s.*, out of W. Steward's money, as soon as you shall receive it, for

"Your humble servant,

"To T. B.

"DE LORRAINE."

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Which bill the said T. B. accepted, but afterwards refused to pay. The pleas were, 1st. *Non Assumpsit*; 2d that T. B. did not, at any time, receive any value of the said W. Steward's money mentioned in the said bill, or any part thereof. To this the plaintiff demurred, and the defendant joined in demurrer. It was insisted that this was no bill of exchange; 1st, because it was not made payable to order; 2dly, Because it was not drawn for value received; and 3dly because it was payable out of a particular fund, at a future time, which might or might not happen.

Per Cur. (After argument, and time taken to consider.) We say nothing upon either of the two first objections; because our opinion, that this is not a bill of exchange, is grounded upon the last objection only. The instrument, or writing, which constitutes a good bill of exchange, according to the law, usage, and custom of merchants, is not confined to any certain form or set of words, yet it must have some essential qualities, without which it is no bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon any thing or fund; it is upon the credit of a person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it. He to whom such bills is made payable or indorsed takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same. In the present case, the drawer did not make this writing an instrument upon his own personal general credit, that in all events he would be liable in case the drawee should not pay it out of William Steward's money; but both the drawer, and the person to whom the bill is made payable, look only at the fund; and no personal credit is given to the defendant, the drawer. It was objected, that this bill was accepted generally and in an unlimited manner; and it must be admitted, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and acceptance would have been good; but the acceptance must mean, that the drawee accepts it to pay out of Steward's money, not out of the drawer's money, and upon this record it appears, that the drawee has not received any of Steward's money. It would be monstrous to say, that either the drawer or acceptor ought to pay this 32*l.* 17*s.* out of their own money. There is no case, in any book, wherever it has been held that an action will lie, as upon a bill of exchange, where the same was payable out of a future contingent fund. The case of *Andrews v. Franklin*, 1 Strange. 24; abridged *post*, 289. was a case on a promissory note, to pay within two months after such a ship was paid off, it was insisted that this was negotiable, it being upon a contingency which may never happen. But the Court held, the paying off the ship to be a thing of a public nature, and morally certain. Upon the whole we are all of opinion, that judgment must be entered for the defendant.

2. *BANBURY v. LISSET.* T. T. 1743. K. B. 2 Stra. 1211.

Assumpsit on a bill in this form, "pay A. B., one month after date, 10*l.* on account of the Veale galley." It was objected, that it was an order upon a particular fund; and on that ground, *Lee, C. J.* ruled it not to be a bill of exchange.

3. *JOSSelyn v. LACIER.* 1714. 10 Mod 294. 316; S. C. Fort. 281.

E. drew upon J., and required him to pay L. 7*l.* a month out of E.'s growing subsistence. L. sued J., and had judgment; but upon a writ of error, that judgment was reversed; because the order or draft was not a bill of exchange, inasmuch as it would not have been payable had E. died, or had his subsistence been taken away.

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JENNY v. HERLE. T. T. 1740. K. B. 1 Stra. 591. more fully reported 8 Mod. 265; *Ld. Raym.* 1361; 11 Mod. 384.

Herle sued Jenny, upon a bill drawn by him upon Pratt, and payable to

As if it be payable "on account of the freight of the Veale galley;" Or out of the drawers growing subsistence

Herle to this effect; "Sir, you are to pay Mr. Herle 1945*l.* out of the money Or out of
in your hands, belonging to the proprietors of the Devonshire Mines, being J. B.'s
part of the consideration money for the purchase of the manor of West hands:
Buckland." Herle had judgment in the Common Pleas; but upon a writ of
error, the Court of King's Bench held this was no bill of exchange, because
it was only payable out of a particular fund, supposed to be in Pratt's hands;
and the judgment was accordingly reversed.

5. HAYDOCK v. LYNCH. M. T. 1729. K. B. 2 Ld. Raym. 1563. S. P.

STEVENS v. HILL. T. T. 1804. N. P. 5 Esp. 247.

In an action on the case on several promises, the plaintiff in his first count Or payable
declared that one T. R., on the 8th of August, 1723, &c. according to the out of the
custom of merchants, made a certain bill of exchange, with his own hand, fifth pay
with the name of the said T. R. thereto subscribed, dated the same day and ment,
year, and directed the same bill of exchange to the said defendant, and there- when it
by requested the said defendant to pay to the said plaintiff, or his order, 14*l.* shall be
3*s.* out of the fifth payment. when it should become due, and it should be come due.
allowed by the said T. R., which was afterwards accepted by the defendant,
by reason of which premises the defendant became liable to pay the 14*l.* 3*s.*
to the plaintiff, and so being liable, promised to pay, &c. There were other
counts in the declaration, to which counts the defendant pleaded *non assumpsit*,
&c., and to the first count the defendant demurred; and it was insisted on by
the defendant's council that the action was maintainable on the instrument as
a bill of exchange, according to resolutions in the cases of Josselyn v. Lacier,
ante, 278. and Jenny v. Herle, *supra*. And of that opinion was the Court,
and Nov. 20. 1729, gave judgment for the defendant.

(P) AS TO THE DRAWER'S NAME.

1. ELLIOTT v. COOPER. M. T. 1723. K. B. 1 Stra. 609; S. C. 2 Lord
Raym. 1376; 8 Mod. 307.

It was objected on demurrer to a declaration on a note, that it al- The draw-
leged only that the defendant made it; but did not state that he signed it; but er's name
by the Court, if he did not either write or sign it, he did not make it for must ap-
making implies signing, and the making of it is alleged.—Judgment for pear upon
plaintiff. the bill. [280]

2. ERESKINE v. MURRAY. 1728. 2 Lord Raym. 1542.

In an action on a bill, it was alleged, that the plaintiff made his bill in wri- Alleging,
ting, and thereby required the defendant to pay. It was objected, on error, however in
that it did not appear that the plaintiff signed the bill; but it was answered that the declara-
the allegation that he made it, and required the defendant to pay. implied that he made
his name was on it, (otherwise he could not request) and that he or somebody
wrote it for him. Judgment for the plaintiff was affirmed.

3. TAYLOR v. DOBBINS. M. T. 1721. K. B. 1 Stra. 399.

* In *assumpsit* upon a promissory note, the declaration stated that the defen-
dant made a note, *et manu sua propria scripsit*. Exception was taken, that Or wrote i
since the stat. of Ann he should have said that the defendant signed the note; suffices;
but the Court held it well enough, because alleged to be written with his own
hand, and there needs no subscription in that case, for it is sufficient if his
name is in any part of it. I, J. S. promise to pay, is as good as I promise to O, if it be
pay, subscribed J. S. made by
one of seve-
ral partners
it is suffici-
ent if it pur
was port in any
way to have
been signed
on behalf
of the
firm.*

4. SMITH v. JARVES. 1720. 2 Lord Raym. 1484.

The declaration upon a note drawn by Jarves and Bailey, stated, that
Jarves for himself and partner, made his note in writing, with his own hand
subscribed, whereby he promised for himself and partner to pay. It was
objected on demurrer, that it was not charged that Jarves had signed the note
for himself and Bailey; but the Court held, that the statement sufficiently eviden-
ced that Jarves did sign for himself and Bailey, and gave judgment for the plaintiff.

* It is more usual to state in the drawing of a bill that A. B. for A. B. and company
drew it, or to draw it in the name of the firm. We shall hereafter see that where a bill
is accepted by an agent without expressly describing himself as such, that he is personally
liable. The same rule obtains where he is drawer.

Where a bill was directed to a particular place, but was not addressed to any one, the Court held that an acceptance by a person residing at that place created the usual liability.

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When a bill is intended to be drawn on two persons, it should be addressed to them accordingly, otherwise the party to whom it is not addressed cannot be declared against as acceptor.

A bill directed to A. or in his absence to B. and beginning, pray gentls. pay, &c. being accepted only by A. may be declared upon without noticing B.

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Bills and notes are to be construed according to the sense in which the person in whose favour they were made understood them, and was intended by the maker.

(Q) AS TO THE DIRECTION TO DRAWEE.

1. **GRAY v. MILNER.** H. T. 1819. C. P. 8. Taunt. 739; S. C. 3 Moore. 90. A. B. drew a bill of exchange payable to his own order at W. street, &c. No drawee was named, but the bill was presented to the defendant, who accepted it. A. B. after such acceptance indorsed the bill to the plaintiff, who, on its dishonour by non-payment, brought this action. The defendant's counsel contended, that as the direction was an essential part of a bill of exchange, the defendant's alleged liability could not be supported. The plaintiff had a verdict; and on a rule nisi, for a new trial, *Dallas, C. J.* said that however the arguments for the defendant might apply before acceptance, that that act rendered it clear to whom the bill was intended to be drawn; independently of the presumption that arose from the appointment of a particular place for its payment.—Rule discharged.

2. **JACKSON v. HUDSON.** E. T. 1810. K. B. 2 Campb. 447.

This was an action against the defendant upon the following bill.

“London, 30th Dec. 1809.

“Ten months after date pay to my order 157*l.* for value received.

“To Mr. J. Irving.

“Accepted J. Irving.

“Accepted Jon. Hudson.”

It was proved that the bill had been drawn in pursuance of an agreement, by which the defendant had undertaken to guarantee to the drawer the payment of Irving's debt, and after the bill was accepted by Irving, the defendant had written an acceptance by himself. Lord Ellenborough held that he was not liable as acceptor, it being a collateral undertaking for the debt of Irving, which ought to have been specially declared on.*

3. **ANON.** E. T. 1700. K. B. 12 Mod. 447.

A bill of exchange was directed to A. or in his absence to B. and began thus, “Gentlemen, pray pay.” The bill was tendered to A. who promised to pay it as soon as he should sell certain goods; and in action against him for non-payment, the declaration described it as a bill directed to the defendant without noticing B. Holt, C. J. held it well.

(R) CONSTRUCTION OF.

ANON. Cited in **SIMPSON v. VAUGHAN.** 2 Atk. 32.

The defendant had given for a particular consideration a promissory note, in the beginning of which it was mentioned to be given for 20*l.* borrowed and received, but at the end were the words “which I promise never to pay.” Lord Macclesfield decided that the payee might recover on it, because the person making the note had intentionally excited expectations which he ought to satisfy.

II. RELATIVE TO THE FORM OF A PROMISSORY NOTE; GENERAL REQUISITES OF, AND OF THE RESEMBLANCE SUCH INSTRUMENT BEARS TO A BILL OF EXCHANGE.

(A) FORM OF A NOTE.

(a) As to the language.

1. **CLERKE v. MARTIN.** E. T. 1701. K. B. 1 Lord Raym. 757; S. C. 1 Salk. 129. **HODGES v. STEWARD.** E. T. 1689. K. B. 12 Mod. 36; S. C. Skin. 306; 1 Salk. 525; Comb. 307. **S. P. NICHOLSON v. SEDGWICK.** E. T. 1697. 1 Lord Raym. 180; S. C. 3 Salk. 67. **CARTER v. PALMER.** E. T. 1699. K. B. 12 Mod. 380. **HORD'S CASE.** H. T. 1696. K. B. 1 Salk. 24. **MEREDITH v. CHUTE.** E. T. 1701. K. B. 2 Lord Raym. 759. n; 1 Salk. 25; 7 Mod. 12. **POLLETT v. PEARSON.** E. T. 1701. K. B. 2 Lord Raym. 759; Holt. 33; S. C. 1 Salk. 129. **CULLING v. WILLIAMS.** H. T. 1702. K. B. 7 Mod. 155; S. C. 11 id. 24; S. C. 2 Lord Raym. 825; 11 Litt. Ent. 227; 1 Salk. 24; S. C. Holt. 273. **BULLER v. CRISPS.** M. T. 1703. K. B. 6 Mod. Rep. 30; S. C. 1 Salk. 120.

In an action on the case brought against the defendant, the plaintiff declared

* But qu. whether the defendant was liable in any shape, as no consideration appears upon the face of the instrument; *Wain v. Warlters*, 5 East. 10; 4 B. & A. 800; 1 Bing. 216; and such an undertaking seems not be consistent with the custom of merchants.

On several promises, as follows: one count was on a general *indebitatus assumpsit*, for money lent to the defendant; another count was on the custom of merchants, as also on a bill of exchange; and showed that the defendant gave a note, subscribed by himself, by which he promised to pay — to the plaintiff, or his order, &c. On *non assumpsit* pleaded, a verdict was given for the plaintiff, with entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff having declared on it as such, the declaration was ill, but that the proper way in such cases is, to declare on a general *indebitatus assumpsit* for money lent, and the note would be a good evidence of it. But it was argued for the plaintiff, that this note being payable to the plaintiff or his order was a bill of exchange; inasmuch as by its nature it was negotiable, and that distinguishes it from a note payable to J. S. or bearer, which is not a bill of exchange, because it is not assignable or indorsible by the intent of the subscriber, and consequently not negotiable, and therefore it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed, payable to J. N., J. N. might have brought his action on it as on a bill of exchange, and might have declared on the custom of merchants. Why then should it not be before such indorsement a bill of exchange to the plaintiff himself; since the defendant by his subscription has shown his intent to be liable to the payment of this money to the plaintiff or his order; especially since he has thereby agreed, that it shall be assignable over, which is by consequence that it shall be a bill of exchange. There is no difference in reason between a note which says, "I promise to pay to J. S. or order, &c." and a note which says, "I pray you to pay to J. S. or order, &c.;" they are both equally negotiable; and to make such a note a bill of exchange, can be no wrong to the defendant, because he, by signing the note, has made himself to that purpose a merchant, 2 Vent. 292. *Sarsfield v. Witherly*, and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants. But Holt, C. J. said, this note could not be a bill of exchange; that the maintaining these actions on such notes were innovations on the rule of common law; and that it amounted to the setting up a new sort of speciality unknown to the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare on these notes on the custom of merchants proceeded from obstinacy, since he had always expressed his opinion against them, and since there was so easy a method as to declare on a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield v. Witherly*, he said he was not satisfied with the judgment, and that he advised the bringing of a writ of error.

2. *COLEHORN v. COOKE*. H. T. 1742. C.J.P. Willes. 396.

Per Willes, C. J. if a promissory note contain an express undertaking to pay, no set form of words is requisite; *vide ante*, 265.

3. *MORRIS v. LEE*. E. T. 1723. 8 Mod. 362.

This was an action against the maker by the second indorser, upon a note in these words, "I promise to account with T. S. or his order for 50*l.* value received by me, &c." After verdict for plaintiff, it was moved in arrest of judgment that this was not a negotiable note, because the promise was not to pay money, but to account; and that in all promissory notes the maker must be an absolute debtor, otherwise they cannot be negotiated. *Sed per Cur.* The act 3 & 4 Ann. is a remedial law, and to be extended in construction as in reason we can. The expressions used in these notes always vary. It is sufficient if the substance of the note is a promise to pay money. The Court must construe this note as a note for payment of money, for a note to account to me or order is absurd. A man that receives money to account for; does not receive money as a duty, but as a trust; therefore no *indebitatus assumpsit* lies, without some misapplication or breach of trust. Besides, this

From the form and language of a promissory note, it was holden before the statute of 3 & 4 Anne. 9. s. 1.* that such an instrument was not within the custom of merchants. [283]

But since that act, no particular form of words is requisite.

A promise to account to account with another or his order for a certain sum value received, is valid,

* See the provisions of this stat. *ante* 254. n. and *Brown v. Harraden*, 4 T. R. 181. 152; *Colehorn v. Cooke*, Willes. 395.

Or I do acknowledge myself to be indebted to A. in 10l. to be paid on demand for value received. An unstamped slip of paper with "I O U 500l." written on it, is not a promissory note, but receivable in evidence as proof of the existence of the debt. Though in one case such a memorandum was holden to be a promissory note.

note is for value received. Even if there had been no verdict, this would have been a good note, but the verdict has put it beyond all dispute, because now a promise is found.—Judgment for plaintiff.

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be indebted to A. in 10l. to be paid on demand for value received. An unstamped slip of paper with "I O U 500l." written on it, is not a promissory note, but receivable in evidence as proof of the existence of the debt. Though in one case such a memorandum was holden to be a promissory note.

4. CASBORNE v. DUTTON. M. T. 1727. 1 Selw. N. P. 378. 5th edit.

The note set forth in the declaration was, "I do acknowledge myself to be indebted to A. in 10l. to be paid on demand for value received." On demurrer to the declaration, the Court, after solemn argument, held that this was a good note within the statute, the words "to be paid" amounting to a promise to pay, observing that the same words in a lease would amount to a covenant to pay rent.

5. CHILDERS v. ROULNOIS. London Adjourned Sitting after Hilary Term, 1822. 1 D. & R. N. P. C. 8. S. P. FISHER v. LESLIE. 1 Esp. 426. scmb. ISRAEL v. ISRAEL. 1 Camb. 499.

Abbot, C. J. in this case held that a slip of paper signed by the defendant in the following terms, "I O U 500l." but neither having any stamp, date or place, nor address, could not be considered a promissory note; that it did not go the length of showing any specific claim on the part of the plaintiff, or any absolute acknowledgment of liability on the part of the defendant; and left it to the jury to say whether certain parol evidence which was adduced was sufficient, combined with the written evidence, to convince them that the plaintiff was really entitled to the sum which he ought to recover from the defendant in this action.—Verdict for defendant.

6. GUY v. HARRIS. E. T. 1800. N. P. Chit, Bills, 335, r. 6th edit.

Action of *indebitatus assumpsit*: the defendant proposed to set off the sum mentioned in an I O U. But Lord Eldon ruled that the memorandum could not be given in evidence, not being stamped, being a promissory note, though not negotiable. See Bayl. 4; Dyer. 206, pl. 122.

7. LEEDS AND OTHERS. v. LANCASHIRE. T. T. 1809. N. P. 2 Campb. 203.

Declaration against defendants as makers of a promissory note in the following form, "We jointly and severally promise to pay plaintiffs or order — for value received by us." Dated, &c. signed by defendants, A. B. and C. D, on the back of which (before it was signed by defendant) was indorsed as follows. The note is as security of all balances A. B. may owe plaintiffs to that amount, to be in force six months, no money to be paid sooner. Lord Ellenborough said, between the present parties it was an agreement or guarantee, and not a promissory note; perhaps in the hands of a *bona fide* holder it might be otherwise, but plaintiffs having declared upon it as such must be nonsuited.

for securing the payment of such balances as may become due is a negotiable note.

(b) *Place where made.*

1. CARR v. SHOW. H. T. 1793. K. B. Bayl. 22. n. 1.

In an action on a promissory note made at Philadelphia, the first count of the declaration stated, that the defendant at Philadelphia, in parts beyond the sea, to wit at London, &c. according to the form of the statute, &c. made his note in writing, &c. There were also the common money counts. The defendant demurred specially to the first count, and pleaded the general issue to the others. On demurrer, the Court intimated a strong opinion that the statute did not apply to foreign notes, and advised the plaintiff to amend; but on the general issue Lord Kenyon said, the note, though not within the statute, is evidence to support any of the money counts; and the plaintiff had a verdict at Guildhall, 1st of May, 1799. The pleadings are entered as of Michaelmas term, 39 G. 3; Roll. 1238.

2. POLLARD v. HERRIES. E. T. 1803. 3 B. & P. 335.

This was an action upon a promissory note made at Paris, payable there, or in London. The plaintiff recovered, and no objection was raised on the ground of its being a foreign note.

common law.

3. HOWRIER v. MORRIS. M. T. 1812. N. P. 3 Campb. 303.

Action upon a promissory note, dated Paris. It was objected that there was a fatal variance, the declaration having stated that the notes were made in

London, when in fact they appeared on the face of them to have been made at Paris. *Per* Lord Ellenborough. The contract, of which the note is merely evidence, is transitory; no reason can be assigned why a note dated at Paris, should not be described in the same manner as if dated at York.—Verdict for the Plaintiff.

4. MILNEY v. GRAHAM. H. T. 1823. K. B. 1 B. & C. 192; S. C. 2 D. & R. 293.

Declaration. *Assumpsit* on a promissory note for 450*l*. Plea, general issue. At the trial, it appeared that the note was made at Dundee, in Scotland. It was objected that an action was not maintainable by the indorsee against the maker of a promissory note, unless it was made in England. The learned judge, before whom the cause was tried, overruled the objection, and the jury found a verdict for the plaintiff. A motion was made for a rule to show cause why a new trial should not be had between the parties. It was contended that the words of the statute 3 & 4 Anne. c. 9. "such note (meaning a promissory note) shall be assignable and indorsable over in the same way as inland bills of England are, by the custom of merchants; and the person, &c. to whom the money is payable, may maintain an action for the same, in such manner as he might upon any inland bill of exchange, made according to the custom of merchants; and the person to whom such note is indorsed or assigned, may maintain an action either against the person who assigned such note, or against any of the persons who indorsed the same, as in case of inland bills of exchange." only meant inland promissory notes; and that a note made in Scotland must be considered as a foreign note, to which the statute did not apply. *Per Cur.* Neither the words, nor the spirit of that act of parliament would induce us to give to it the limited construction now contended for. The words, "all notes," are large enough to include foreign as well as inland promissory notes. The spirit of the act is a liberal one, for the encouragement and advancement of commerce, which would be much clogged by a decision that foreign notes could not be sued upon in England. The practice which has uniformly taken place of suing on these notes, is the best construction, in the absence of authority, that can be given. We are, therefore, of opinion, that the promissory notes made in Scotland are negotiable in England, and may be made the ground of an action in this court.—Rule refused. See *Selw. N. P.* 4th edit. 363; *Forbes on Bills.* 174. 3 B. & P. 338.

5 BROWN v GRACEY. M. T. 1821. K. B. MSS 1 D. & R. N. P. C. 41 n. Declaration upon a promissory note made in Scotland; and verdict for the plaintiff. Motion for a new trial, on the ground that it being a Scotch contract, plaintiff should have established the defendant's liability by the law of Scotland. But Abbott, C. J. said, that if there was any difference between the laws of the two countries as to the liability of the defendant, it lay upon the latter to prove the difference.—Rule refused.

(c) *Date.* See also, *ante*, p. 266.

TAYLOR v. KINLOCH. H. T. 1816. N. P. K. B. 1 Stark. 175. *abr. ante*, vol. iii. p. 567.

The date of a promissory note, is *prima facie* evidence of its existence at the time it bears date.

(d) *To whom payable.* See also *ante*, p. 263

BLUCKENHAGAN v. BLUNDELL. E. T. 1819. K. B. 2 B. & C. 417.

Declaration on a note, by which it was stated, that defendant promised to pay to J. P., or to the plaintiffs, or to his or their order. Another count stated J. P. to be since dead. Each count averred that the note was delivered to the plaintiffs, and negatived payment to J. P. Defendant demurred. The Court held that this was not a note within the statute, because it was not payable in certain either to J. P. or to the plaintiffs; but the claim of either, or of the indorsee of either, might be defeated by payment of the other; and if it

* But it has been holden, that forging a Scotch bank note is not an offence within the stat. 2 Geo. 2. c. 25. against forgery, the bill being made payable where it was drawn; the *King v. Dick*, 1 Leach. 68; S. C. 2 East. 925.

an omission to state the place where drawn, is immaterial.

An action may be maintained by the indorsee against the maker of a promissory note made in Scotland for it is negotiable in England.* [286]

And a promissory note made in Scotland may be in all cases sued upon here, unless defendant shows that by the law of Scotland he is not responsible. A note, payable to A. or to B. & C., is not a valid promissory note, and cannot be sued upon as such by the payee.

[237] were not within the statute when issued, subsequent events could not make it so. It was urged, that in legal operation, it was payable to J. P. and the plaintiffs. But the Court said they could not take that to be its operation, as the declaration was framed; and judgment was given for the defendant. See 2 East. 359; 5 T. R. 482; 2 B. & P. 413.

Payable to order. See also *ante*, 273.

The words, *or order*, or *to bearer*, are not essential to the validity, of a promissory note; Smith v. Kendall, 6 T. R. 123. S. C. 1 Esp. 231. *abr. post.*

(f) *Time and place of payment.* See also, *ante*, 268.

1. EXON v. RUSSELL. H. T. 1816. K. B. 4 M. & S. 35.

A memorandum at the foot of a note stating where it shall be payable;

The particular place at which a note was made payable, was not inserted in the body of the note, but mentioned at the foot of the instrument. In an action against the maker, there was no proof advanced at the trial of any presentment at such particular place, for want of which it was objected that the plaintiff was not entitled to recover; to which it was answered that the place of address, not being inserted in the body of the note, formed no part of the contract, whereof proof of presentment at the place was unnecessary. The Court, after hearing the cases, (2 H. Bl. 409; 4 Campb. 200; 13 East. 459; 14 id. 550; 5 Taunt. 30.) intimated an opinion that the address at the foot of the note was to be considered only as a memorandum and not as a part of the instrument itself; whence it followed that a special presentment was not essential.

2. SPILITGERBER v. KOHN. M. T. 1815. K. P. 1 Stark. 125.

Or a memorandum of acceptance on a note payable after sight, are no parts of the note.

Indorsee against maker on a note made in Prussia, and payable seven days after sight; In the margin were these words, "accepted on myself, payable every where," (and these words were on the note when it issued.) It was urged that they altered the nature of the note, and should have been noticed in the declaration. But Lord Ellenborough said they constituted no part of the original instrument; they were merely an acknowledgment of a sight of the note; and though they were contemporaneous with the note, their effect was in point of law subsequent.

3. SPROUTE v. LEGG. T. T. 1822. K. B. N. P. 3 Starke 156.

But the preceding decisions seem questionable.

Declarations on several promissory notes, dated Dublin, at the foot of each, were these words, *payable*, 81, *Dame-street, Dublin*. It was objected that this description amounted to a variance, as it had been holden in Exon v. Russell, *supra*, that words at the foot of the note, formed no part of the contract, to which it was replied, that the case alluded to applied only to a special acceptance of a bill, payable at a particular place, which decision had been overruled by Howe v. Young, *post*, *Per Abbott, C. J.* It cannot be deemed a variance.

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(B) GENERAL REQUISITS.

(a) *Must be payable at all events.*

1. CARLOS v. FANCOURT. H. T. 1794. K. B. 5 T. R. 482.

The 3 & 4 Ann. c. 9 does not extend to promissory notes payable on a contingency.

Assumpsit upon a promissory note, whereby the plaintiff in the life-time of defendant's wife, promised to pay her the sum of 10*l.* out of *h's* money that should arise from his reversion of 43*l.* when sold. The defendant suffered judgment by default, and brought a writ of error; and the court held that this note could not be declared upon as a negotiable security, under the stat. 3 & 4 Anne. c. 9. the object of which statute was to put promissory notes on the same footing with bills of exchange in every respect, and they must stand or fall by the same rules by which bills of exchange were governed; and unless they carried their own validity on the face of them, they were not negotiable; and on that ground bills of exchange in this respect must govern promissory notes; and therefore reversed the judgment. See 3 Wills. 207; 2 Blac. Rep. 782; 1 Stra. 24; 2 Ld. Raym. 1331.

2. PEARSON v. GARRATT. M. 1692. K. B. 4 Mod. 242; S. C. Skin. 398.

And even before that statute such notes were not within the custom of merchants.

In an action on a note of hand for 60 guineas, which the defendant was to pay to the plaintiff when he married a particular person, the plaintiff declared as on a bill of exchange. The defendant demurred, and the plaintiff joined in the demurrer.

The defendeant's counsel took the following exceptions to the declaration, viz. that the plaintiff in his declaration had not averred that he was a merchant or that the note was made according to the custom of merchants, neither had he stated any consideration for the making such note. *Per Cur.* If the note had been given by way of commerce, it would have been good; but to pay money on such a contingency, cannot be called a trading, and therefore not within the custom of merchants. Judgment for the defendant.

3. ROBERTS v. PEAKE. E. T. 1757. K. B. 1 Furr. 323.

The plaintiff, as indorsee of a note, sued one of the makers; the instrument was in these words; "we promise to pay A. B. 116*l.* value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it." And upon a case reserved, the Court held it was not a negociable note, because it was not payable eventually and conditionally, and not absolutely and at all events. Plaintiffs nonsuited.

4. COOKE v. COLEMAN. M. T. 1745. K. B. 2 Stra. 1017; S. C. Willes. 393.

An error from C. B., a note to pay A. or order. six weeks after the death of the defendant's father, for value received, was holden to be a negociable note; within the statute 3 Ann. c. 9; for this is not a contingency which may never happen, but it is only uncertain as to the time, which is the case with all bills payable at so many days after sight.

5. GOSS v. NELSON. H. T. 1757. K. B. 1 Burr. 227.

A promissory note was given to an infant, payable when he should come of age; viz. on such a day in such a year; and the court held it good, because there was no condition or uncertainty, but it was to be paid positively and at all events, the time of payment being only postponed.

6. ANDREWS v. FRANKLIN. H. T. 1717. K. R. 1 Stra. 24.

Action on a promissory note to pay within two months after a ship was paid off.

It was insisted for the defendant, that this was not negociable, it being on a contingency that might never happen. *Sed per Cur.* The paying off of the ship is a thing of a public nature; the instrument is, therefore, negociable as a promissory note.—The plaintiff had judgment.

7. BARNESLEY v. BALDWIN. E. T. 1748. K. B. 7 Mod. 417; S. C. Stra. 1151. S. P. PEARSON v. GARRETT. M. T. 1692. K. B. 4 Mod. 242. Skin. 39.

A promissory note to pay money within so many days after the defendant should marry, was, on consideration, holden not to be a negociable note within the statute.

8. HILL, ON, & C. v. HALFORD AND ANOTHER. E. T. 1801. Ex. Ch. 2 B. & P. 413. S. P. BURCHELL v. SLOCOCK. M. T. 1728, K. B. 2 Ld. Raym. 1515.

Error from a judgment of K. B. Declaration stated that the plaintiff in error made and signed his certain note in writing, commonly called, &c. bearing date, &c. and thereby promised to pay to the defendants in error, by the names, &c. the sum of, &c. out of the sale or produce, immediately when sold, of "a certain inn," and the goods, &c. value, &c. Averment, that "afterwards and before the exhibition of the bill of them, the defendants in error, to wit, on, &c. at, &c. the said messuage or dwelling house, called, &c. and the goods in the said note specified, were sold, whereby the said sum of money in the said note specified became, and was forthwith and immediately due and payable, according to the form and effect of the said note, whereof the plaintiff in error then and there had notice." Defendants in error obtained judgment by default, and on execution of a writ of inquiry, obtained general damages. Error, that the cause of action suggested in the declaration was insufficient in law to enable the defendants in error to maintain their action. It was contended for the plaintiffs in error, that the period assigned for the maturity of the bill was not sufficiently definite to make a good note, as the

Hence a promise to pay on the death of C. D., provided he leaves the defendant, sufficient, or they shall be otherwise able to pay [289] it, is not within the stat.* But a promise to pay within a limited time after C. D's death;

Or when A. B. shall come of age;

Or two months after a ship is paid off, are respectively valid notes.

Though one payable within a limited time after marriage is within the act.

So where a promissory note was made payable on the sale of a certain house and goods with an averment of such sale having taken place, the Court held it not a good note within the stat. 3 & 4 Anne. c. 9. s. 1.

* So a promise by defendant to pay to plaintiff 2*l.* within a month after Michaelmas, if the defendant did not pay the 2*l.* for which plaintiff stood engaged for his brother J. B. is special contract and not within the statute, Appleby v. Biddle, cited 1 S;

So an instrument acknowledging the receipt of drafts for the payment of money, and promising to pay the money specified in such drafts; Or an instrument, stating that it is taken for securing

the payment of all such balances as shall be due from one of the makers to the payee; On an instrument, purporting [291] on the face of it to be a note, payable also lately for the price of goods, but having an indorsement upon it (written before the note was signed,) stating that But a promise to pay to bearer a named sum, being the portion of a value as under, deposited in security for the payment thereof, is a valid note.

A note must be for the payment of money only. Hence

sale on which it was to become due was a contingency which might never happen; and the cases of *Dawkes v. Lord Deloraine*, 2 Bl. 782; *S. C. 3 Wills*. 207; and *Caslon v. Fancourt*, 5 T. R. 482; were cited in support of the doctrine. The Court concurred in these arguments, and reversed the judgment. See 6 T. R. 123, 1 *Str.* 24; 1 *Wils.* 262; 2 *ibid.* 9; 2 *Lord Raym.* 1545.

9. *WILLIAMSON AND ANOTHER v. BENNETT AND MITCHELL.* H. T. 1010, 2 Campb. 416.

The plaintiff declared on the following contract, as a promissory note, "borrowed and received, in drafts payable to defendants at a future day, which the defendants promise to pay unto plaintiffs with interest, dated, &c." Defendant's counsel insisted that this was not a promissory note, but a special agreement. *Per Lord Ellenborough C. J.* This instrument is not a promissory note, it was only a conditional agreement to repay the money in case the drafts were duly honoured, and not an absolute undertaking to pay the money at all events.—Plaintiffs nonsuited.

10. *LEEDS v. LANCASHIRE.* T. T. 1809. K. B. N. P. 2 Campb. 205.

Upon an instrument in the common form of a joint and several promissory note, signed by A, B, and C, there was an indorsement stating that the same was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case. An action having been brought by the payee against B, the first count stating the note as payable on request, and a second as payable six months after date; *Lord Ellenborough C. J.* held, that although the instrument possibly might have been considered as a promissory note in the hands of a *bona fide* holder who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the indorsement must be incorporated with the body of the note; and consequently an action could not be maintained upon it without an agreement stamp.

11. *HARTLEY v. WILKINSON.* E. T. 1815. K. B. 4 M. & S. 25; S. C. 4 Campb. 127.

A note was made payable to Foster, or order, for 25l., "being the amount of the purchase money for a quantity of fir, belonging to Mr. Hartly." Before the note was signed, the following memorandum was indorsed upon it; "This note is given on condition that if any dispute shall arise between Mr. Hartley and Lady Wray, this note to be void." In an action upon the note by the indorsee against the maker, *Lord Ellenborough* thought it not a note within the statute of Anne, because its payment depended upon there being no dispute between Mr. Hartley and Lady Wray, and he nonsuited the plaintiff. On a motion for a new trial, the Court concurred in opinion with him, and refused the application.

it was given on condition that if any dispute arose about the sale of goods it should be void, or not negotiable, would be similarly viewed by the Court.

12. *HAUSSOULLIER v. HARTSINCK.* T. T. 1708. K. B. 7 T. R. 733.

Payee against maker of a promissory note, whereby the defendant promised to pay—, or bearer, 25l. being a portion of value as under, deposited in security for the payment hereof. Upon a special case being reserved, the Court said they were clearly of opinion that although as between the original parties to the transaction, the payment of the notes was to be carried to a particular account, the defendants were, nevertheless, liable to the plaintiff on these notes which were payable at all events.—Judgment for plaintiff.

(b) *Must be for the payment of money only.*

1. *MARTIN v. CHAUNTRY.* T. T. 1748. K. B. 2 *Str.* 1271.

On error from C. P. the Court held, that a note to deliver up horses and a wharf, and pay money at a particular day, could not be declared on as a note within the statute, and therefore reversed the judgment.

SMITH v. BOHEME. M. T. 1714. K. B. Cited 2 *Ld. Raym.* 1362.

On the production of the following note—"I promise to pay J. S. so much

money, or render the body of J. N. to prison before such a day." It was adjudged not to be a negociable note within the act of parliament, and that an action could not be maintained on such note, because the money was not absolutely payable, but it depended upon a contingency, whether he would consent J. N. to prison or not.

3. CHADWICK v. ALLEN. T. T. 1739. K. B. 1 Stra. 796.

On a demurrer to a declaration on the following instrument, it was holden to be a note within the statute—"I do acknowledge, that Sir Andrew Chadwick has delivered me all the goods and notes for which 400*l.* were paid him on account of Colonel Synge; and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10*l.*, which 10*l.*, and 15*l.* 5*s.* balance due to Sir Andrew, I am still indebted, and do promise to pay."—Judgment was given for the plaintiff.

But a promise which from the time of making, it cannot be complied with, but on the payment of money, is as good as a negociable note.

MORRIS v. LEE. T. T. 1725. K. B. 1 Stra. 629.

In an action on the case, brought by the plaintiff as second indorsee of a note, signed by the defendant, whereby the defendant promised to be accountable to A., or order, for 100*l.* value received. The plaintiff declared on the note, and also on an account stated, and on *non assumpsit* pleaded, a verdict was given for the plaintiff, with entire damages. It was moved in arrest of judgment, that this action could not be maintained by the plaintiff as indorsee of this note, because it was not negociable by stat. 3 & 4 Anne, c. 9. for a note within that statute must necessarily and originally import a promise to pay the money.

[292] So is a promise that A. B. shall be accountable.

Per Cur. There are no precise words necessary to be used in a promissory note, or bill of exchange; Rast. Ent. 338. "Deliver such a sum of money," makes a good bill of exchange. But if the promissory note is within the intent of the statute, it is sufficient, though it does not follow the very words of the act. Now, by receiving the value, the defendant became a debtor; and when he promises to be accountable for it to A., it is the same thing as a promise to pay to A. And it is the stronger, because it is to be accountable to A. or order, which is the proper expression used in such notes, and mentioned in the statute, where it is intended the note should be indorsable or negociable. But it would be an odd construction to expound the word *accountable*, to give an account, when there may be several indorsees. But if this note had been value received on account, it might have had a very different consideration.

A note must be for a certain sum;

(c) *Must be for a specific sum.*

SMITH v. NIGHTINGALE. T. T. 1818. K. B. N. P. 2 Stark. 375.

Defendant gave Eastling this note—"I promise to pay James Eastling my head carter, 65*l.*, with lawful interest for the same, three months after date, with all other sums that may be due to him." Eastling's administratrix sued thereon; Lord Ellenborough thought it no note, even for the 65*l.*, but an agreement; and it not being impressed with an agreement-stamp he nonsuited the plaintiff.

(d) *Must not be payable out of a particular fund.*

1. HILL v. HALFORD. E. T. 1801. C. P. 2 B. & P. 413

The defendants in error sued Hill as maker of a note, whereby he promised to pay them 190*l.* "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c. value received." The declaration averred the sale of the inn and goods before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed, and general damages recovered, Hill brought a writ of error in the Exchequer Chamber, and the Court held that this promise could not be declared on as a note, and therefore reversed the judgment.

And must not be payable out of a particular fund.

[293] Though a note to pay a sum of money on &c. for value received of the premises in Rosemary Lane, has been good.

2. BURCHALL v. SLOCOCK. M. T. 1728. K. B. 2 *Ld. Raym.* 1545.

The plaintiff brought an action on the case against the defendant, on a promissory note, wherein the plaintiff declared, that the defendant O. S. and one T. J., on the 24th of May, 1725, &c., made their certain note in writing, called a promissory note, subscribed with their names, bearing [date the same holden

*Or a promise to pay 300*l.* to order in good East India bonds; Bull. N. P. 272.

day and year, and delivered the said note to the intestate W. B., by which note the said O. and T. jointly and severally promised to pay to the said W 10l. 12s. in three months after date of the said note, for value received of premises in Rosemary-lane, late in the possession of one T. R. S., by reason of which premises, and also by force of the statute, &c. In the declaration there were three other counts. To the first count the defendant demurred, and showed for cause, that the note set out in it was not a promissory note within the statute; and the plaintiff joined in demurrer. But the Court held it clearly to be a promissory note within statute 3 & 4 Anne, c. 9. and judgment was given for plaintiff.

MACK v. WOOD. T. T. 1738. N. P. Peake. 130. S. P. CLERK v. BLACKSTOCK. 1846. N. P. Holt. 474.

Assumpsit on a promissory note, made by the defendant and one Bowling, in the following words; *viz.* "I promise to pay, three months after date, to W. March, 8l. 5s., for value received in fixtures. 'Robert Bowling,' 'Thomas Ward.'"

It was objected that this promissory note was joint only, and not several.

Lord Kenyon. I think this note beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton, of Chester, exactly similar to the present, in which I was counsel for the defendant. I persuaded the judge that it was a joint note only, and the plaintiff was non suited; but on application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter "I," applies to each severally.—

Verdict for the plaintiff.

FERRIS v. BOND. T. T. 1821. K. B. 4 B. & A. 679.

A promissory note was in these words—"I, John Corner, promise to pay to Absolem Ferris, the sum of 50l., with lawful interest for the same, or his order, at six months' notice. Dated this 24th June, 1808. John Corner, or else Henry Bond." In an action on this note against the defendant (Bond,) the question was reserved, whether this was, as to him, a note within the statute of Anne. The Court held that it was not, and observed, it is an absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, for he undertakes to pay it only in the event of Corner's not paying. See 1 *Str.* 643; 2 *B. & A.* 417

HALL v. SMITH. E. T. 1823. K. B. 1 B. & C. 407; S. C. 2 D. & R. 584.

Declaration in *assumpsit* on a promissory note, of which the following is a copy—"Town and county of Southampton Bank. I promise to pay the bearer, on demand, 1l. value received. Southampton, 24th day of March, 1818. For W. Smith." Plea in abatement, the non-joinder of W. P. Smith, and W. R. Taylor. Replication, that the promises were made by defendant himself, and not jointly with other persons. It appeared at the trial, that the defendant W. Smith, and W. R. Taylor, were bankers and co-partners at Southampton, but that the notes were signed by the defendant only. The jury found their verdict for the plaintiff, damages 10l., subject to the opinion of the Court on the question, whether the defendant was liable alone on the notes. It was contended for the plaintiff, that the notes were several as well as joint, from the circumstance of the note beginning in the singular number "I," and in *March v. Ward, Peake.* N. P. C. 130; and that admitting that the defendant signed the notes on behalf of himself and partners, yet he, by using the singular number, had made himself separately liable, as was decided in *Lord Galway v. Mathews* (1 Campb. 403,) and *Clerk v. Blackstone* (Holt. N. P. C. 474.) On the part of defendant it was urged, that the effect of the argument for the plaintiff was, to make the notes several as to the defendant, but joint as to the other two partners, which would be putting the partners in a different situation than any partners intended to be placed, and that it would follow, if the Court decided that this was a several as well as a joint note, that the clerks in the Bank of England would be personally liable, for all the notes which they respectively signed.

Per Cur. We are all clearly of opinion that the plaintiff is entitled to our judgment. There is not any similarity between this case and the notes of the

A note made by several and expressed, We promise to pay is a joint note only, but if signed by several and expressed I promise &c it is joint and several.

A promissory note signed "J. C. or else H. B." was held by the Court not to be binding on H. B. his promise being contingent.

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[294] One of a firm of bankers signed the usual promissory notes beginning with "I promise to pay," for himself and the rest of the firm, and the

Bank of England, for the signer of the Bank notes expressly states, that he signs for the Governor and Company. We are not called at present upon to say whether the note is several as to all parties; it is sufficient for this case if it be several as to the defendant. Now what does the defendant do. He says, "I promise to pay," that is, taking the words in their enlarged sense, for myself, and for all my partners, promise to pay. It is a clear position of law, that if a partner enter into a contract in his name, on behalf of others, an action may be maintained against him, or the parties for whom he contracts may be sued. On that principle, then, this defendant is liable. But we think also, on the principle, that when an instrument begins with the pronoun I, and is signed by several persons, that each of them is individually liable, that this defendant is rightly sued, for as to himself it clearly applies. It has been said, that it is very hard upon the defendant, that he should be made to bear the burden of his partners; but on the other hand, a great difficulty would be thrown upon the plaintiff, if he were forced to prove that all the persons whose names might be on the notes were partners. Perhaps the notes have a greater circulation, from the circumstance of each party who signs them making himself personally and individually liable for the amount.—*Postea to the plaintiff.* See 1 *Lutw.* 696.

4, *OVINGTON v. NEALE*, M. T. 1728. 2. *Ld. Raym.* 1544; S. C. 2 *Str.* 819. S. P. BUTTLER v. MALISSY, H T. 1717, 1 *Str.* 76.

The plaintiff declared upon a note, by which the defendant and another, jointly or severally, promised to pay; and upon error the Court of King's Bench held it bad, because the plaintiff's had not shown a title to bring a separate action against the defendant, for he only says that he has this or some other cause of action; and judgment for the plaintiff reversed.

5; *REES. ABBOTT*, T. T. 1778, *Cowp.* 832.

Declaration upon a note stated, that the defendant and another made their note, by which they jointly or severally promised to pay, and upon error, after judgment by default, *Buttler v. Malissy* and *Ovington v. Neale*, *supra*, were cited. *Sed per Lord Mansfield*. If, or is to be considered in this case as a disjunctive, the plaintiff is to elect, and by bringing an action against one, he has made his election to consider the note as several; but in this case it may be deemed synonymous with *and*, and thus both *and* each promise to pay. The nature of the transaction forces this construction.

6. *SIFFKIN v. WALKER AND ANOTHER*, M. T. 1809. 2 *Camp.* 308.

Declaration alleged, that the *defendant's* made their promissory note; but on the instrument being produced in evidence, it appeared to have been made by Walker only; on its being objected, that the action should have been brought against him, and not jointly against the other defendant, it was proposed, in order to obviate this difficulty, to show that the note had been given in payment, of a joint debt. Plaintiff nonsuited. See 1 *Camp.* 383. 403; 15 *East.* 7. 10; 3 *Camp.* 493; 4 B. & C. 664; 2 C. & P. 138.

III. RESEMBLANCE BETWEEN NOTES AND BILLS OF EXCHANGE.*

1. *HEYLEY v. ADAMSON*, M. T. 1758. K. B. 2 *Burr.* 669; S. C. 2 *King* 379.

The question was, whether the indorsee of a bill was bound to make a demand upon the drawer, as the indorsee of a note must upon the maker, and *Per Lord Mansfield*. While a note continues in its original shape, of a promise from one man to another, it bears no similitude to a bill; but when it is indorsed, the resemblance begins, for then it is an order by the indorser upon the maker to pay the indorsee, which is the very definition of a bill. The indorsee is the drawer, the maker of the note the acceptor, and the indorsee

* The law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing; 2 *Bl. Com.* 470; *Bayl.* 69. The existence of this resemblance being once admitted, the law applicable to bills immediately attaches to promissory notes; hence, in the subsequent parts of the abridgment, they will be classed indiscriminately.

the person to whom it is made payable; and all the authorities, and particularly *Lord Hardwicke*, in a case of *Hammerton v. Mackarell*, Mich. 10 Geo. 2. put promissory notes on the same footing with bills of exchange. See 2 B. & P. 80; *Willes*. 394. 399; 5 T. R. 486 2 Burr. 669; Bayl. 3 n. a.

2. *BROWN v. HARRADEN*. H. T. 1791. 4 T. R. 148. *S. P. CARLOS v. FAN COURT*. 5 T. R. 482. *EDIE v. EAST-INDIA COMPANY*. Burr 1224.

And the rules respecting notice of dishonour, and days of grace, are the same.

In deciding in this case that three days grace should be allowed on promissory notes Lord Kenyon observed, that the effect of the statute was, that notes were wholly to assume the shape of bills; and Buller, J. added, that the cases cited in the argument showed clearly, that the Courts of Westminster had thought the analogy between bills and Notes so strong that the rules established with respect to the one, ought also to prevail with respect to the other; that the language of the preamble of the act was express, that it was the object of the legislature to put notes exactly on the same footing with bills; and that the enacting part pursued that intention.

IV. RELATIVE TO VERBAL OR COLLATERAL CONTRACTS CONTROLLING OR VARYING A BILL OR NOTE.

Evidence is not admissible to vary the tenor of the bill, as to show that the defendant did not accept it upon his own private account, but upon behalf of his principal.

THOMAS v. BISHOP. M. T. 1733. K. B 2 Stra. 955; S. C 1 Ca. Temp. Hard. 1.

A Bill of exchange was drawn in this manner—"At 30 days sight pay to John Somerville, or order, 200*l*. and place the same to the account of the York Building's Company, value received by yours, Charles Mildey." Directed to Mr. H. Bishop, cashier of the York Buildings Company, in Winchester-st. and was accepted by Bishop in the following manner—"Accepted, H. Bishop, 23th June, 1732." This bill was indorsed to the plaintiff, who brought an action thereon against the acceptor. At the trial, a letter of advice was proved which was directed to the governor and company of the York Buildings Company, wherein notice was taken of this amongst others, in the following words; "John Sommerville, 30 days sight, 200*l*." But according to the direction of the judge, the jury found for the plaintiff. And, on a motion for a new trial, the counsel for the defendant urged, that the defendant in his own right was not liable for the 200*l*., but only the company. That this was the practice with regard to the cashiers of the bank, who never accept bills in any other manner; and that the acceptance by the servants of bankers is always so, and binds their masters, though it be not specified to be on their account; that it ought to be left to the jury to say if the defendant had accepted it for himself or the company; that the bill was not only drawn on a servant of the company, but by a servant of the company. The counsel admitted, that if it had been directed to Bishop without any addition, such a general acceptance would have bound him only.

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But the Court said that the direction was right. for the bill upon the face of it, imports to be drawn upon the defendant, and it is accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself; and it would be, of course, dangerous to trade to admit of evidence, arising from extrinsic circumstances, to vary the contract apparent on the bill.

2. *HOARE AND OTHERS v. GRAHAM AND ANOTHER*. T. T. 1811. N. P. 3 Camp. 57.

Or to show that at the time of the making the note the plaintiff engaged to reneue it;

Action of indorsee against payee of a promissory note. Defence, that the plaintiff, in consideration of defendant's indorsement, verbally agreed that the note should be renewed when it became due. But Lord Ellenborough thought such evidence inadmissible; indeed, the parol consideration, he said, was inconsistent with the written instrument; and if circumstances of this kind were to be admitted, it would overturn the first principles of evidence, and bills of exchange and promissory notes would become mere nullities.—Verdict for plaintiff. See *Funb*. 175; 4 Taunt. 202.

Or that payment should not be demanded

3. *CAMPBELL v. HODGSON*. H. T. 1819. C. P. N. P. Gow. 74.

Action on a bill of exchange. Defence, that it had been agreed, between the parties, that payment should not be demanded in the event of the drawer

being able to reimburse himself out of other funds, and that such funds had been received by the plaintiff. The plaintiff produced evidence of other demands. *Per Dallas, C. J.* The effect of a bill cannot be controlled by a parol undertaking; and in the absence of any express appropriation by the payee, he had a right to apply it as he pleased, and to hold the acceptor, the defendant, still liable.—Verdict for plaintiff.

4. *FREY v. HAWKINS*, M. T. 1817. C. P. 8 Taunt. 92; S. C. Holt. 550.

In an action upon a note by indorsee against indorser, defendant insisted upon a want of notice of the dishonour. Plaintiff offered parol evidence, that at the time the note was given, and defendant (who only lent his name) indorsed it, it was understood that payment was not to be required until certain estates of the maker were sold, nor then, unless they produced sufficient; and that, therefore, the defendant knew the note had not been honoured. *Cibbs, C. J.* rejected the evidence, and nonsuited the plaintiff; and on a rule nisi for a new trial, the Court held the evidence rightly rejected, because it contradicted the note; and the rule was discharged.

5. *WOODBIDGE v. SPOONER*, M. T. 1819. K. B. 3 B. & A. 233; S. C. 1 Chit. Rep. 661.

This was an action on a note payable on demand, for value received. Evidence was given that the bargain was, at the time the note was given, that it should not be payable till after the maker's death, and should then be in nature of a legacy, and on that ground the plaintiff was nonsuited; but on rule nisi to enter a verdict for plaintiff, the Court observed, no evidence has been produced to show that there was a want of consideration, or that the consideration for the note was illegal, or that it was not delivered to the party to be made use of for his own benefit. The utmost extent to which it goes is an attempt to prove that the note was not payable, as on the face of it imported to be. This therefore was to contradict the note itself, which, by the rules of law, a party is prohibited from doing. It is said, that in this case there is a fraud on the legacy duty. But if this note was not recoverable, it could not be a testamentary gift; and if so, there could be no fraud on the legacy duty.—Rule absolute. See 2 Ves. jun. 111. 122; 4 id. 355; 4 Brown's C. C. by Eden. 286; 1 P. Wms. 441; 3 id. 356; 3 Camp. 57; 1 Moore. 535; Phillips on Evidence, 4th edit. 488 to 498; Holt. N. P. C. 21. and 10 to 13; 7 Taunt. 224; Tollers Executors, 232 to 237.

6. *STONE v. METCALFE*, T. T. 1815. N. P. 4 Camp. 217; S. C. 1 Starkie 53.

Action by payee against maker of a promissory note, payable two years after date. There appeared to be a memorandum indorsed on the back, attested by one A., to the following effect—"That the note should not be called in, unless it was agreeable to defendant, until three years after payee's decease." Defendant's counsel urged, that the memorandum was part of the note, and therefore it should be received in evidence as well as the note; but Lord Ellenborough, C. J. said, that a defeasance indorsed on the back of a note by the payee, was no part of the contract, unless it was shewn to have been written at the time the instrument was made, or was stamped.—Verdict for plaintiff.

7. *BRUCE AND OTHERS v. HINLY*, E. T. 1815. N. P. 1 Stark. 23.

In this case, which was an action on a promissory note, Lord Ellenborough held, that a letter inclosing it might be read in evidence as a declaration accompanying the act, provided it could be shown that the letter was the envelope in which the note was sent.

V. RELATIVE TO THE STAMP ON A BILL OR NOTE.†

(A) PENALTY FOR MAKING ACCEPTING, OR PAYING, NOT DULY STAMPED.

By the 55 Geo. 3. c. 184. s. 11, it is enacted, that if any person or persons to

* So a memorandum on a bill or note before it is issued may, in some instances, be considered as part of the bill or note, and control its operation; *Exon v. Russel*, 4 M. & S. 505; as a memorandum that if any dispute shall arise respecting the consideration, the bill or note shall be void; *Hartley v. Wilkinson*, 4 Campb. 127.

† Before the 33 Geo. 3. bills and notes were written on a plain piece of paper unstamped. By a statute made in that year, certain duties were imposed on every piece of

Making, shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept, accept or pay, or cause or permit to be accepted, or paid, any bill of exchange, or paying draft, or order, or promissory note for the payment of money, liable to any of bills not duly stamped, parchment, or paper, on which bills and notes, falling under certain descriptions, subjects should be written, engrossed, or printed. By a subsequent act, 55 Geo. 3. c. 184. s. 1. party to all the former duties are repealed, and others imposed in their stead.

By sect. 2. of that act it is enacted, that there shall be raised, levied, and paid, unto and for the use of his majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several instruments, matters, and things mentioned and described in the schedule thereunto annexed (except those standing under the head of exemptions, *post*, §12.), or for or in respect of the vellum, parchment, or paper, upon which such instruments, matters, and things, or any of them, shall be written or printed, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the same schedule, and that the said schedule and all the provisions, regulations, and directions therein contained with respect to the said duties, and the instruments, matters, and things, charged therewith, shall be deemed and taken to be part of that act, and shall be received and construed as if the same had been inserted therein at this place, and shall be applied, observed, and put in execution accordingly. And the schedule of the same act imposes the following duties on an

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Inland bill of exchange, draft, or order, to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money

	Amounting to	£ 2 0	and not exceeding	£ 5 5	Duty.
Exceeding	5 0		20 0		0 1 6
	20 0		30 0		0 2 0
	30 0		50 0		0 2 6
	50 0		100 0		0 3 6
	100 0		200 0		0 4 6
	200 0		300 0		0 5 0
	300 0		500 0		0 6 0
	500 0		1000 0		0 8 6
	1000 0		2000 0		0 12 6
	2000 0		3000 0		0 15 0
	3000 0				1 5 0

Inland bill of exchange, draft, or order, for the payment to the bearer or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money

	Amounting to	£ 2 0	and not exceeding	£ 5 5	Duty.
Exceeding	5 0		20 0		0 1 6
	20 0		30 0		0 2 0
	30 0		50 0		0 2 6
	50 0		100 0		0 3 6
	100 0		200 0		0 4 6
	200 0		300 0		0 5 0
	300 0		500 0		0 6 0
	500 0		1000 0		0 8 6
	1000 0		2000 0		0 12 6
	2000 0		3000 0		0 15 0
	3000 0				1 10 0

Inland bill, draft, or order, for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf. The same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bill, draft, or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom. The same duty as on a bill payable to bearer or order, on demand, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite. The same duty as on a bill on demand for the sum therein expressed only.

(801)

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money, within the intent and meaning of this schedule, viz,

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or satisfaction of any sum of money, where

the duties imposed by that act, without the same being duly stamped for denoting the duty thereby charged thereon, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of 50*l*. [801]

(B) PENALTY FOR POST-DATING.

By the 55 Geo. 3. c. 184. s. 12. it is enacted, that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note, for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that in fact it shall not in fact become payable in two months, if made payable after date, or in 60 days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for de- such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some other person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund which may or not be available, or upon any condition or contingency, which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

Foreign bill of exchange (or bill of exchange drawn in, but payable out of Great Britain,) if drawn singly and not in a set. } The same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100 <i>l</i> .		<i>s. d.</i>
Not Exceeding	£ 100 and not exceeding £ 200	1 6
Exceeding	200 500	3 0
	500 1000	4 0
	1000 2000	5 0
	2000 3000	7 6
	3000	10 0
		15 0

And the following duty on a promissory note, or the payment to the bearer on demand, of any sum of money.		<i>s. d.</i>
Not Exceeding	£ 1 1 0	0 5
Exceeding	1 1 0 and not exceeding . £ 2 2 0	0 10
	2 2 0 5 5 0	1 3
	5 5 0 10 0 0	1 9
	10 0 0 30 0 0	2 0
	30 0 0 50 0 0	5 0
	50 0 0 100 0 0	8 6

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

Promissory notes for the payment in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money.		<i>s. d.</i>
Amounting to	£ 2 0 0 and not exceeding £ 5 5 0	1 0
Exceeding	5 5 0 20 0 0	1 6
	20 0 0 30 0 0	2 0
	30 0 0 50 0 0	2 6
	50 0 0 100 0 0	3 6

These notes are not to be re-issued, after being once paid.

Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but exceeding two months after date, or sixty days after sight, of any sum of money,		<i>£ s. d.</i>
Exceeding	£ 100 and not exceeding £ 200	0 4 6
	200 300	0 5 0
	300 500	0 6 0
	500 1000	0 8 6
	1000 2000	0 12 6
	2000 3000	0 15 0
	3000	1 5 0

[302) noting the duty thereby imposed on a bill of exchange and promissory note, Post dating for the payment of money at any time exceeding two months after date, or 60 days after sight, he, she, or they shall, for every such bill, draft, order, or note, subjects the party to a penalty of 100l. (C) PENALTY FOR ISSUING UNSTAMPED BILLS ON BANKERS, WITHOUT SPECIFYING THE PLACE WHERE ISSUED, OR POST-DATED.

Issuing un- stamped bills, drafts or orders, on bankers, without specifying the place where issued, or post-dating them, sub- jects the party to a penalty of 20l. if he receives them; and to a penai- ty of 100l, if he be a banker, and pay them.

By 55 Geo. 3. c. 184. s. 13, it is enacted, that if any person or persons shall, after August 31, 1815, make and issue, or cause to be made or issued, any bill, draft or order, for the payment of money to the bearer on demand, upon any banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall, for every such bill, draft or order, forfeit 100l. And if any person or persons, shall knowingly receive or take any such bill, draft, or order, in payment of, or as security for, the sum therein mentioned, he, she, or they shall, for every such bill, draft, or order, forfeit the sum of 20l. ; and if any banker or bankers or any person or persons acting as a banker, upon whom any such bill, draft, or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-

These notes are not to be re-issued, after being once paid.

Promissory notes for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days af- ter sight, of any sum of money

Amounting to	£	2	2	and not exceeding	£	5	5	0	1	6
Exceeding	5	5		20	0			0	2	0
	20	0		30	0			0	2	6
	30	0		50	0			0	3	6
	50	0		100	0			0	4	6
	100	0		200	0			0	5	0
	200	0		300	0			0	6	0
	300	0		500	0			0	8	6
	500	0		1000	0			0	12	6
	1000	0		2000	0			0	15	0
	2000	0		3000	0			1	5	0
	3000	0						1	10	0

These notes are not to be re- issued after being once paid.

Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain.

The same duty as on a pro- missory note, payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule, viz.

All notes promising the payment of any sum or sums of mo- ney, out of a particular fund, which may or may not be avail- able; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made paya- ble to the bearer, or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited.

But such of the notes and instruments here exempted from the duty on promissory notes, shall nevertheless be liable to the duty which may attach thereon, as agreements or other- wise.

Exemptions from the proceeding, and all other stamp duties; —All promissory notes, or bills, for the payment of money, is- sued by the Governor and Company of the Bank of England, commissioners of the Navy, commissioners for victualing the navy, or commissioners for the transport service.

dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or bankers, or person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of 100*l.*; and moreover shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft, or order shall be drawn, or his, her, or their creditors, or administrators, or his, her, or their assignees or creditors in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them.

But promissory notes issued by bankers to bearer on demand, not exceeding 100*l.* [303] may be re-issued by the original makers, without further duty.

By 55 Geo. 3. c. 184. s. 14. it is enacted, that from and after August 31, 1815, it shall be lawful for any banker or bankers, or other person or persons who shall have made and issued any promissory note for the payment to the bearer on demand, of any sum of money not exceeding 100*l.* each, duly stamped according to the directions of this act, to reissue the same from time to time after payment thereof, as often as he, she; or they shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory notes so to be re-issued as aforesaid, shall be good and valid, and as available in the law to all intents and purposes, as they were upon the first issuing thereof.

And by s. 15. that no promissory notes for the payment to the bearer on demand, of any sum of money not exceeding 100*l.* which shall have been made and issued by any bankers or other persons in partnership, and for which the proper stamp duty shall have been once paid according to the provisions of this act, shall not be deemed liable to the payment of any further duty, although the same shall be re-issued, by and as the note of some only of the persons who originally made and issued the same, or by and as the note of any one or more of the persons who originally made and issued the same, and any other person or persons in partnership with him or them jointly: nor although such note, if made payable at any other than the place where drawn, shall be re-issued with any alteration therein only of the house or place at which the same shall have been at first made payable.

And such notes are not liable to further duty, though re-issued by certain persons not strictly the original makers.

(D) PENALTY FOR RE-ISSUING, AND NOT CANCELLING THEM.

By 55 Geo. 3. c. 184. s. 19. it is enacted, that all promissory notes thereby allowed to continue re-issuable for a limited period, but not afterwards, shall by the payment thereof at any time after the expiration of such period, and all promissory notes, bills of exchange, drafts, orders for money, not hereby allowed to be re-issued, shall, upon any payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated and satisfied, and shall be no longer negotiable or available in any manner whatsoever, but shall be forthwith canceled by the person or persons paying the same; and if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note hereby allowed to be re-issued for a limited period as aforesaid, at any time after the expiration of the term or period allowed for that purpose, or if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note, bill of exchange, draft, or order for money, not hereby allowed to be re-issued at any time after the payment thereof; or if any person or persons paying, or causing to be paid, any such note, bill, draft, or order, as aforesaid, shall refuse or neglect to cancel the same, according to the directions of this act, then and in either of those cases, the person or persons so offending shall, for every such note, bill draft, or order, as aforesaid, forfeit the sum of 50*l.*; and in case of any such note, bill, draft, or order, being issued contrary to the intent and meaning of this act, the person or persons so re-issuing the same, or causing or permitting the same to be re-issued, shall also be answerable and accountable to his majesty, his heirs and successors, for a further duty in respect of every such note, bill, draft, or order, of such and the same amount as would have been chargeable thereon, in case the same had been then issued for the first time, and so from time to time as often as the same shall be re-issued; which further duty may be sued for and recovered accordingly as a debt to his majesty, his heirs and successors.

Re-issuing bills and drafts contrary to the act, subjects the party to a penalty of 50*l.*

Taking re-issued bills, &c. subjects the party to a penalty of 20*l*.

(E) PENALTY FOR TAKING RE-ISSUED BILLS.

By the 55 Geo. 3. c. 184. s. 89. it is enacted, that if any person or persons shall receive or take such note, bill, draft or order, (as mentioned in the preceding division), in payment of, or as a security for, the sum therein expressed, knowing the same to be re-issued contrary to the intent and meaning of this act, he, she, or they shall, for every such note, bill, draft, or order, forfeit the sum of 20*l*.

Where a bill contained the terms of an agreement, it was holden to require an agreement stamp.

(F) WHEN NECESSARY TO HAVE AN AGREEMENT STAMP.

1. NICHOLSON v. SMITH. E. T. 1822. K. B. N. P. 3 Stark. 128.

To prove an agreement made between the plaintiff, an outgoing, and the defendant, an incoming tenant, whereby the latter had undertaken to take the stock, &c. a bill of exchange containing the terms of the agreement was produced. On an objection to its admissibility for want of an agreement stamp. *Abbott, C. J.* held the exception valid, and rejected the bill as evidence. See 1 *Campb.* 387 ; 5 *Esp.* 269 ; 2 *Campb.* 437 ; 3 *Taunt.* 182.

2. BUTTS v. SWANN. T. T. 1820. C. P. 4 Moore. 484 ; S. C. 2 B. & B. 78.

But where a letter contained an order to pay money out of the proceeds of the sale of gunpowder absolute in itself, and not depending upon any subsequent assent, though followed by a correspondence, it was holden to be an order for [305] the payment of money, and as such ought to have been stamped as a bill, and not as an agreement.

To trover for gunpowder by the assignees of certain bankrupts, the defendants proposed to show, as an answer to the action, payment out of the proceeds according to the order of the bankrupts, and gave in evidence two letters addressed to them by, and signed by, the bankrupts in the following terms ;—“ We request you will pay to Messrs. H. C. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 1, and charge the same to our account.” Several letters passed between the bankrupts, Messrs. H. C. and Son, and the defendants, respecting the payment directed in the above letter, when a second letter relied on was sent by the bankrupts to the defendants, in which they confirmed the former letter as to the payment to H. C. and Son, and further directed the appropriation of the balance and other matters. The letters were, on payment of a penalty, stamped as an agreement, in order to be received in evidence. It was contended for the plaintiff, that the intent of these letters rendered them subject to the provision of the statute respecting bills and notes, 55 Geo. 3. c. 184. by which all “ orders for the payment of any sum of money out of any particular fund which may or may not be available,” are rendered liable to certain stamps thereby imposed ; and that, therefore, these letters should, to have effect in evidence, have been stamped when written. *Per Cur.* The question is, whether the facts of this case bring it within the intent of the stat. That act did not contemplate bills of exchange alone, as urged in the arguments for the defendants, but intended to subject to stamps all orders whatever, by which money was directed to be paid, whether the funds out of which it is payable, “ may or may not be available.” It may be attempted to construe the language of these letters to intend an agreement, in which case they would have been properly stamped ; but an agreement cannot be established without admitting the order to pay, and that fact alone brings the instrument within the definition of the act ; if we come to this conclusion, we show that the letters should have been stamped when written, as an order is complete when it issues.—Judgment for plaintiffs. See 1 B. & A. 39.

(G) EFFECT OF A BILL NOT BEING STAMPED.

An unstamped bill or note being a nullity the creditor may sue on the original demand.

1. TYTE v. JONES, Sittings at Westminster, adjourned to the 29th of October, 1738, K. B. 1 East. 58. n.

Declaration on a promissory note with money counts. The note being unstamped, and therefore inadmissible in evidence, *Lord Kenyon* permitted plaintiff to recover on the count for money lent, by proving that the defendant upon demand made, acknowledged the debt in respect of which the note had been given. See *Alves v. Hodgson*, 7 T. R. 241 ; 3 T. R. 406 ; 4 *Taunt.* 288 ; 1 *Esp.* 129 ; 2 B. & P. 118.

2. GREGORY v. FEAZER. M. T. 1813. N. P. 3 Camp. 453.

And such an instrument is admissible in

In this case the plaintiff proved that he had advanced money to the defendant, who gave him a promissory note for the amount, on unstamped paper. The defence was, that he had given the note in a state of intoxication, without

having the value. On the question whether the note could be given in evidence to prove the loan, *Lord Ellenborough* held that it could not; but he said the jury might look at it as a contemporary writing to prove or disprove the fraud imputed to plaintiff. See *Re v. Inhabitants of Pendleton*, 15 East. 449.

(H) EFFECT OF A BILL BEING DRAWN ON A STAMP NOT OF A PROPER DENOMINATION.

1. *FARR V. PRICE*. M. T. 1800. K. B. 1 East. 55.

In an action upon a promissory note, the only evidence produced was the note itself, which was objected to as having a ninepenny, instead of an eight-penny stamp, as required by the 3 Geo. 3. c. 90. A verdict was taken for the plaintiff, subject to the opinion of the Court upon the point of law, as to the admissibility of the instrument as evidence. The question now came before the Court. *Per Cur.* However much it were to be wished that an *ad valorem* stamp would suffice in these cases, yet, till the legislature so declare it, no other than the particular stamp appropriated by the law to the particular instrument can be deemed sufficient. The words of the Stamp act are express. [306] It therefore matters not that the stamp used was larger than required, or was applicable to the same purpose. Nevertheless, as there are other general counts in the declaration, the plaintiff may give evidence of a consideration moving from him to the defendant, not being debarred by the circumstances that have taken place. See 3 T. R. 406; 6 id. 317; 7 id. 241; 1 N. R. 30; 1 Esp. 292; 5 East. 309; 2 M. & S. 338; 4 Taunt. 20.

By the 43 Geo. 3. c. 127, s. 6, it is enacted, that every instrument, matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, matter, or thing, any statute, law, or usage to the contrary notwithstanding.

By 65 Geo. 3. 184, s. 10, it is enacted, that from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination, or rate of duty, but of equal or greater value on the whole, with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof.

2. *CHAMBERLAIN V. PORTER*. E. T. 1804. C. P. 1 N. R. 30.

A rule nisi for a new trial was obtained in this cause, on the ground that the promissory note, on which the action was brought, was written on a stamp of an improper denomination, viz. on a receipt stamp, which was, however, in sufficient amount. *Sir James Mansfield C. J.* As this case has arisen on an act of parliament, we have to consider only the intention of the legislature when it passed; and in order to this, it is necessary to revert to a series of acts, and from the absolute enactments on the subject, or from their absence, to ascertain, whether notes similar to the present were expressly provided for; or from the silence of the legislature, to infer that they were intended to remain in *statu quo*. At the passing of the 22 Geo. 3. c. 33. which first imposed the necessity of stamping promissory notes, that obligation had not been extended to receipts. By the 23 Geo. 3. c. 49. the statute 22 Geo. 3. c. 33. was repealed, and stamps were imposed on receipts; in each of these statutes it is enacted, that the commissioners shall use and provide such stamps to denote the said several duties as shall be requisite in that behalf; and in the latter acts a provision is introduced, requiring the commissioners to keep a separate account for each description of stamps. The 27 Geo. 3. c. 13. s. 41. contains the same provisions, and further empowers the commissioners to provide a new or separate stamp to denote each rate of duty, &c. The statute 31 Geo. 3. c. 25. which repeals the one last mentioned, and forbids the stamping of bills and notes after they are made, together with the 35 Geo. 3. c. 55.

* And, therefore, in criminal prosecutions, the want of a promise being affixed to that document is not, in general, an available objection; see 1 Phil Ev. 454. *et seq.*

[307] & §7. G. 3. c 50. retain the distinction introduced by the former acts. Then follows the statute 37 Geo. 3. c. 136. which after reciting the necessity of prefixing proper stamps to divers instruments, in order to their admissibility in evidence, provides by section 5. that where bills, &c. and promissory notes, have been drawn on stamps of an improper denomination, though of an equal or superior value, such bills and notes may be properly stamped by the commissioners, on payment of the duty and penalty. It is, therefore, our opinion, that in consequence of the act last mentioned, the note in question is invalid, for otherwise it would stand in a better situation than those cases intended to be remedied by the act.—Rule absolute. See 6 T. R. 317; 1 Esp. 292; 1 East. 55; 2 *ibid.* 414; *Bayly on Bills*, p. 20. n. c.

3. WILSON v. VYBAR. E. T. 1812. C. P. 4 Taunt. 288.

Or on a stamp of an inferior value, they are equally void.

To an action for goods sold and delivered, the defendant pleaded payment by a bill of exchange. The bill was indorsed by the defendant to the plaintiff; but not being presented for payment when due, and the acceptor being incapable of paying it, application was made for that purpose to the drawer and to the defendant, who both refused, on the ground of laches in the plaintiff in not presenting it to the acceptor. It was then shown for the plaintiff, that the bill was drawn on a stamp of insufficient value; but the defendant proved that the acceptor's clerk had orders and sufficient assets to pay it when presented, notwithstanding the insufficiency of the stamp. But the Court held the want of a sufficient stamp fatal, and therefore refused a rule nisi for a new trial moved for by the defendant.

4. WILSON v. KENNEDY. M. T. 1794. K. B. N. P. 1 Esp. 245.

But the plaintiff may go into evidence of the consideration.

Action on a promissory note. Defence, that it was not duly stamped. On a question being raised, whether the plaintiff might establish the consideration? Lord Kenyon, C. J. said, if the note is produced, but cannot be admitted in evidence on account of a defect in the stamp, the plaintiff may proceed to prove the consideration for which the note was given.

See cases referred to in *Ty'e v. Jones*, ante, p. 505.

(1) AT WHAT TIME TO BE STAMPED.*

WRIGHT AND OTHERS v. RILEY. H. T. 1793. N. P. Peake. 230.

If a bill of exchange has a proper stamp when produced, the defendant cannot

This was an action against indorser of a bill of exchange. Defence, that when the bill was drawn, it was not stamped, and therefore void by the 31 Geo. 3. c. 25. s. 19; but Lord Kenyon said, that the commissioners having

* The 55 Geo. 3. c. 184. does not in terms require that the paper, &c. shall be stamped before the bill and note is written thereon; but by the 31 Geo. 3. c. 25. s. 19. it is enacted that all vellum, parchment, and paper liable to any stamp duty by that act, shall, before any of the matters or things thereby charged, shall be engrossed, printed, or written thereupon, be brought to the head office of stamping vellum, parchment, or paper; and the commissioners by themselves, or by their officers employed under them, shall and may, from time to time, stamp and mark any quantity or parcels of vellum, parchment, or paper before any of the matters or things thereby charged shall be engrossed, printed, or written thereupon, upon payment of the several duties payable for the same by virtue of this act. and no bill of exchange, promissory note, or other note draft or order, liable to the duties by this act imposed, or any of them, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity, unless the vellum parchment, or paper, on which such bill of exchange, promissory note, or other note, draft, or order, receipt, discharge, acquittance, note, memorandum, or writing shall be engrossed printed, written, or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate or duty, as by that act is directed, or some higher rate or duty in that act contained; and it shall not be lawful for the said commissioners, or their officers to stamp or mark any vellum, parchment, or paper, with any stamp or mark directed to be used or provided by virtue of that act, at any time after any bill of exchange, promissory note, or other note, draft, or order, shall be engrossed, written, or printed thereon, under any pretence whatever.

And by 55 Geo. 3. c. 184. s. 3. the commissioners are empowered to do all things necessary for carrying that act into execution, in the like manner as former commissioners have been authorised to do for carrying into execution former acts, and by sec. 4. all powers, provisions, clauses, regulations, and directions, relating to former duties, are extended to the duties by that act imposed.

The 34 Geo. 3. c. 33. authorising the commissioners to stamp bills, &c. after they were drawn, on payment of a certain penalty, was only a temporary act, and has long since expired.

stamped it, although in direct opposition to an act of parliament, rendered it a valid instrument, and it was not for a judge at Nisi Prius to ask when it was stamped; if such was allowed, it would be a great check upon paper credit.—Verdict for plaintiff.

show it was not stamped when drawn.

(J) AMOUNT OF DUTY PAYABLE, AND HOW REGULATED.

[308]

(And see note, ante p. 29.)

1. WHITLOCK v. UNDERWOOD. T. T. 1823. K. B. 2 B. & C. 157; S. C. 3 D. & R. 356.

Declaration in *assumpsit* on a promissory note, payable to the plaintiff, or bearer, for 40*l.* Piea, general issue. It appeared on the trial, that the note was written on a piece of paper, having a stamp of 2*s.* 6*d.* It was objected, that according to part 1. of the schedule of the 55 Geo. 3. c. 184. it ought to have borne a stamp of 5*s.* The learned judge, before whom the cause was tried being of that opinion, directed a nonsuit. A rule nisi was obtained to set it aside. *Per Cur.* The question for our consideration is, whether or not it comes within the statute 55 Geo. 3. c. 184. Now, by the schedule, part 1. bills of exchange are divided into two classes; those payable to bearer or order, on demand or otherwise, not exceeding two months after date; and those for any time exceeding two months after date. But promissory notes are divided into two several classes; as 1*st*, when payable to bearer on demand, for any sum not exceeding 100*l.*; 2*d*, when payable in any other manner than to bearer on demand, not exceeding two months after date, or sixty days after sight, of any sum amounting to 40*l.*, and not exceeding 100*l.*; 3*d*, when payable in any manner for a time not exceeding two months after date, or 60 days after sight, for any sum exceeding 100*l.* and 4*th*, when payable in any manner for a time exceeding two months after date, or 60 days after sight, for any amount above 40*s.* Now, in effect, this is a note drawn payable on demand for a sum not exceeding 100*l.*; and therefore falls within the first class of notes, and should have had a stamp of five shillings.—Rule discharged.

A promissory note, payable to bearer, is a note within the first class of promissory notes in the schedule, part 1, to the statute 55 Geo. 2. c. 184. and consequently such a note for 40*l.* requires a stamp of 5*s.* [309]

2. STURDY v. HENDERSON. T. T. 1821. K. B. 4 B. & A. 592.

This was an action on a note payable two months after sight, for 400*l.* impressed with a stamp of 6*s.* The plaintiff was nonsuited, because it had not a stamp of 8*s.* 6*d.*, the latter stamp being applicable to notes payable more than 60 days after sight. A motion was made for a new trial, on the ground that it was in substance at two months after date, for that the drawing of it was at sight of it, and it would be payable without the maker's having a further sight of it; and therefore, in that view, was properly stamped; those bills which do not exceed two months after date, or 60 days after sight, only requiring a stamp of 6*s.* But it being suggested that bank post bills at 7 days after sight, which are really notes, do not become payable till after they have been presented for acceptance, and a further term of seven days, and days of grace, have elapsed. The Court thought this note would require a new presentment for sight; and was, therefore, properly a note after sight, and not after date.—Rule refused.

And where a promissory note was drawn payable two months after sight, it was held that as such two months exceeded 60 days' sight, or two months after date, it required a stamp of 8*s.* 6*d.*

3. PRUSSING v. ING. H. T. 1821. K. B. 4 B. & A. 204. S. P. ISRAEL v. BENJAMIN. T. T. 1811. K. B. N. P. 3 Campb. 40.

An objection was taken on the trial of an action brought upon a promissory note for 30*l.* and interest from the date, payable three months after date, and which was impressed with a 2*s.* 6*d.* stamp; that as the 30*l.* with the interest for three months, secured by the note, exceeded 30*l.*; and the note was payable at a time exceeding two months, or 60 days, a 3*s.* 6*d.* stamp was necessary. But the learned judge, before whom the cause was tried, overruled the objection; and afterwards, on a motion for a new trial, the whole Court discharged the rule, saying that the addition of interest ought not to be taken into calculation; for otherwise, a bond for 1000*l.* and interest would require a stamp for a larger sum than 1000*l.*, which would be contrary to practice and all principle.—Rule refused. See 2 B. & A. 305; 2 Moore. 715; 8 Taunt. 660; *abr. ante*, vol. iii. p. 586; 3 Campb. 40.

A bill for 30*l.* at 3 months with interest, payable from the date, may be drawn on a stamp applicable to 30*l.*

The word "date" in the stamp act denotes the period of payment expressed on the face of the bill; if, therefore, it be post-dated,

Where a bill was drawn in Ireland, and blanks left for the dates, sums, & drawee's name, and transmitted to England, where it was completed and negotiated, it was held that this was to be considered as a bill from the time of signing and indorsing it in Ireland, and that an English stamp was unnecessary.

A bill may be drawn in Jamaica upon a stamp of that colony and filled up in England.

But an unstamped note made in that island where the law requires a stamp, is void.

A bill dated abroad, but

4. UPSTONE v. MARCHANT. T. T. 1823. K. B. 2 B. & C. 10; S. C. 3 D. & R. 198. S. P. PEACOCK v. MURRELL. M. T. 1819. N. P. 2 Stark. 558.

This was a motion for a new trial. It appeared that the defendant being about to accept a bill for 21l. payable at two months, which was dated on the 21st of December; the date was, at his request, altered to the 31st; and that it was written on a 2s. stamp. It was urged, that the bill must be considered as being for two months and ten days; and that, therefore, a stamp of 2s. 6d. was requisite by the 55 Geo. 3. c. 184. *Per Cur.* It is quite clear the date required by the act is the one which appears written on the bill, otherwise the greatest injustice would ensue.—Rule refused. See 2 Stark. 558. so as to make it in fact drawn for more than two months, yet it is sufficient to have the stamp for a bill payable two months after date.

(K) OF THE DUTY PAYABLE WHEN DRAWN IN IRELAND, AND COMPLETED IN ENGLAND.

- SNAITH v. MINGAY, H. T. 1813. K. B. 1 M. & S. 87.

A., B., & Co., in Ireland, had one partner C., resident in England, where he carried on a separate trade; and he was restrained by the articles of partnership from drawing bills in the partnership's name. They sent him over four signatures, made by them as drawers and indorsers on copper-plate impressions, with blanks for dates, sums, and drawee's name. They were to be used by him in his separate trade; and he filled them up, and used them accordingly. They were on Irish stamps only; and in an action upon them against the second indorser, it was objected that they ought to have had English stamps; upon which point the opinion of the Court was now requested. *Per Cur.* The question is, whether this is to be considered as an Irish or an English bill of exchange. The case seems to be this: A piece of paper, signed by a person in Ireland, is given for the purpose of being filled up, and operating as a bill of exchange; and although it came here as an incipient bill of exchange, and so far having the essence of a bill, as it had the name of the drawer and first indorser upon it; yet when afterwards the party to whom it was sent, and who had authority given him by the signature, addressed it to a third person as drawee, and supplied the sum and date, it became by those subsequent acts perfect, and operated as a bill of exchange, from the time when it was signed and intended to have such operation; for the cases show that when a signature is once written to a paper which is intended to have the operation of a bill of exchange, it becomes such when perfected from the time when it was signed, so as to support an allegation that the party either drew or indorsed the bill. It must, therefore, be looked upon as an Irish bill of exchange, and as such, an English stamp, it will be allowed, is unnecessary. See Doug. 513; 1 H. Bl. 313; 7 T. R. 241; 3 Campb. 166.

(L) OF THE DUTY PAYABLE WHEN DRAWN IN THE COLONIES, AND FILLED UP IN ENGLAND.

1. CRUTCHLEY v. MANN. M. T. 1813. C. P. 1 Marsh. 29; S. C. 5 Taunt. 529.

Payee against drawer of a bill of exchange. It appeared the defendant drew the bill in Jamaica, upon a stamp of that island, and sent it to England with a blank for the payee's name. On the question, whether the Jamaica stamp was sufficient, the Court were of opinion that it was, and that no English stamp was necessary.

2. ALVES v. HODGSON. E. T. 1797. K. B. 7 T. R. 241.

The promissory note in this case had been made in Jamaica. It was objected to for want of a stamp, and the defendant proved that the law of Jamaica required a stamp. Lord Kenyon, C. J. thought the objection fatal; but allowed the plaintiff to take a verdict; and on motion for a nonsuit, the Court said we must revert to the laws of the country in which the note was made; and unless it be good there, it is not obligatory in a court of law in England.—Rule absolute for a new trial.

(M) OF THE DUTY PAYABLE WHEN DRAWN IN ENGLAND AND DATED AT A FOREIGN PLACE.

1. JORDAINE v. LASHEROOKE. E. T. 1798. K. B. 7 T. R. 601.

In an action against the acceptor of a bill, purporting to have been drawn really at Hamburg, the defence was, that it was drawn in London, and therefore unavailable unless duly stamped. The payee and indorser was called to prove where it was drawn, but he was objected to as an incompetent witness. Lord Kenyon, C. J. however, admitted him; and on his testimony the defendant had a verdict on the counts of the bill. On a rule nisi for a new trial, Lord Kenyon, C. J., Grose and Lawrence, J^s. were of opinion, that as he was neither interested in the event, nor rendered infamous by conviction of any crime he was properly admitted; and that he having proved that the bill was really drawn in England, showed that it was void in its first creation, and that the plaintiff could not recover upon it.

2. ABRAHAM V. DUBOIS. M. T. 1815. N. P. 4 Camb. 269.

Action on bill of exchange, dated Paris. Defence, that the bill had been drawn in London, and was therefore void for want of a stamp. In support of this, it was proved that the drawer was in London two days after the date of the bill. Lord Ellenborough said, a circumstance of such importance, and importing such a serious offence, must be made out by distinct evidence; though it was not very probable that the bill was drawn at Paris the day it purported to be; nevertheless, proof of the drawer being in England would not establish that it was drawn in that country.—Verdict for plaintiff.

(N) OF THE DUTY PAYABLE WHEN DRAWN ABROAD AND FILLED UP IN ENGLAND.

BOEHM V. CAMPBELL. M. T. 1818. C. P. N. P. Gow. 56.

Action on a guarantee for the payment of a bill of exchange. Defence, that it was invalid for want of a stamp; it appeared that the body of the bill was filled up and accepted in England, but was transmitted to the drawer, resident at Antwerp, for his signature; this, it was contended, did not constitute it a foreign bill, as it was made and completed in England. But Dallas, C. J. said, the drawing is the making of the bill; and, therefore, if a person resident abroad draw a bill, the bill does not require an English stamp.

(O) AMOUNT OF DUTY PAYABLE ON NOTES DRAWN ABROAD.

By the 55 Geo. 3. c. 184. s. 19. it is enacted, that from and after the passing of that act, promissory notes for the payment of money to the bearer on demand, made out of Great Britain, or purporting to be made out of Great Britain, or purporting to be made by or on the behalf of any person or persons resident out of Great Britain, shall not be negotiable, or be negotiated, or circulated, or paid in Great Britain, whether the same shall be made payable in Great Britain or not, unless the same shall have paid such duty, and be stamped in such manner, as the law requires for promissory notes of the like tenor and value made in Great Britain; and if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment, any such promissory note, or shall demand or receive payment of the whole or any part of the money mentioned in such promissory note, from or on account of the drawer thereof in Great Britain, the same not being duly stamped as aforesaid; or if any person or persons in Great Britain shall pay or cause to be paid the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or appointment for that purpose therein contained; the person or persons so offending shall, for every such offence, forfeit the sum of 20*l*. provided always, that this clause shall not extend to notes made and payable only in Ireland.

(P) OBJECTION TO INSUFFICIENCY OF STAMP WHEN UNAVAILABLE.

ISRAEL V. BENJAMIN. T. T. 1811. K. B. N. P. 3 Campb. 40.

Drawer against acceptor. Defence, that the bill was drawn on an insufficient stamp. It appearing that the defendant had paid money into Court, Lord Ellenborough, C. J. said, no objection can be taken to the insufficiency of the stamp, after payment into Court, for that is an admission of the validity of the instrument. The plaintiff had a verdict. On motion to set it aside, the Court concurred with the Lord Chief Justice.

(Q) EXEMPTION FROM DUTY.

All bills is
sued by the
Bank of
England
Commis-
sioners of
navy.

[313]

Commis-
sioners for
victualling
the navy,

Orders on
demand on
bankers,

And bills
by army
paymas-
ters,

And prom-
issory
notes, de-
pending on
an uncer-
tainty,
Not paya-
ble to order.

Instru-
ments re-
sembling
notes,
Which are
liable to
other duty,

Bank of
England
notes,

And one
pound, one
guinea, and
two pound
notes, pay-
able to
bearer on
demand, is
sued by the
Bank of
Scotland,

The 55 Geo. 3 c. 184. exempts the following bills from duty :

All bills of exchange, or bank post bills issued by the governor and Compa-
ny of the Bank of England.

All bills, orders, remittances, bills and remittance certificates. drawn by com-
missioned officers, masters and surgeons of the navy, or by any commissioner
or commissioners of the navy, under the authority of the act passed in the 35th
year of his majesty's reign, for the more expeditious payment of the wages and
pay of certain officers belonging to the navy.

All bills pursuant to any former act or acts of parliament by the commis-
sioners of the navy, or by the commissioners for victualling the navy, or by
the commissioners for managing the transport service and for taking care of
sick and wounded seamen upon and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on
demand, and drawn upon any banker or bankers, or any person or persons
acting as a banker, who shall reside or transact the business of a banker within
ten miles of the place where such drafts or orders shall be issued, provided
such place shall be specified in such drafts or orders ; and provided the same
shall bear date on or before the day on which the same shall be issued ; and
provided the same do not direct the payment to be made by bills or promissory
notes.

All bills for the pay and allowances of his majesty's land forces, or for other
expenditures liable to be charged in the public regimental or district accounts,
which shall be drawn according to the forms now prescribed or hereafter to be
prescribed by his majesty's orders, by the paymasters of regiments or corps,
or by the chief paymaster or deputy paymaster and accountant of the army
depot, or by the paymasters of recruiting districts, or by the paymasters of de-
tachments, or by the officer or officers authorised to perform the duties of the
paymastership during a vacancy, or the absence, suspension, or incapacity of
any such paymaster as aforesaid, save and except such bills as shall be drawn
in favor of contractors or others, who furnish bread and forage to his majesty's
troops, and who by their contracts or agreements shall be liable to pay the
stamp duties on the bills given in payment for the articles supplied by them.

And the following notes. All the notes promising the payment of any
sum or sums of money out of a particular fund which may or may not be availa-
ble ; or upon some condition or contingency which may or may not be per-
formed or happen ; where the same shall not be made payable to the bearer
or to order, and also where the same shall be made payable to the bearer or
to order, if the same shall amount to 20*l*. or be indefinite.

And all other instruments bearing any degree the form or style of promisso-
ry notes, but which in law shall be deemed special agreements, except those
hereby expressly directed to be deemed promissory notes. But such of the
notes and agreements here exempted from the duty on promissory notes, shall
nevertheless be liable to the duty which may attach thereon as agreements, or
otherwise.

And all promissory notes for the payment of money issued by the governor
and company of the bank of England, are exempt from all duties.

By the 23d sect. of the 55 Geo. 3. c. 184. it is enacted that from and after
the 31st day of August, 1815, it shall be lawful for the Governor and Com-
pany of the Bank of Scotland, and the Royal Bank of Scotland, and the
British Linen Company in Scotland, respectively, to issue their promissory
notes for the sums of one pound, one guinea, two pounds, and two guineas,
payable to the bearer on demand, on unstamped paper, in the same manner as
they were authorised to do by the aforesaid act of the 48 Geo. 3 they, the
said Governor and Bank of Scotland, and the Royal Bank of Scotland, and
British Linen Company, respectively, giving such security, and keeping and
producing true amounts of all the notes so to be issued by them respectively,
and accounting for and paying the several duties payable in respect of such
notes in such and the same manner, in all respects, as is and are prescribed

and required by the said last mentioned act, with regard to the notes thereby allowed to be issued by them on unstamped paper, and also to re-issue such notes respectively from time to time after the payment thereof as often as they shall think fit.

the Royal Bank of Scotland and the British Linen Company in Scotland are exempt from duty.

VI. RELATIVE TO THE CAPACITY OF THE CONTRACTING PARTIES TO A BILL OR NOTE.

1st IN GENERAL.

All persons having legal capacity to contract in general, may become parties to a bill or note.

2d. IN PARTICULAR INSTANCES.

(A) AGENTS.

1. THOMAS v. BISHOP. M. T. 1733. K. B. Ca. Temp. Hard. 1; S. C. 2 Stra. 955; S. C. 3 Bac. Ab. 563; 2 Keb. 133. pl. 1. 16; S. C. Ridgw. 911; 1 Barnard. K. B. 320. 335; S. C. 7 Mod. 181.

A bill of exchange was drawn in this manner :

"At 30 days sight pay to J. S. or order 200*l.* and place the same to the account of Y. B. company, value received by yours, C. M." Directed to B. cashier of the Y. B. company in W. and was accepted by B. in this manner : "Accepted, B. 13th June, 1732." This bill was indorsed to the plaintiff, who brought an action thereon against B. the acceptor. At the trial a letter of advice was proved, which was directed to the governor and company of the Y. B. wherein notice was taken of this bill among others, in the following words ; "J. S. 30 days sight, 200*l.*" Put according to the direction of the Judge, the jury found for the plaintiff ; and now on a motion for a new trial, it was urged, that the defendant in his own right was not liable, but only the company ; that this is the case of the cashier of the bank, who never accepts bills in any other manner, and that the acceptance by the servants of bankers is always so, and binds their master, though it be not specified to be on their account, that it ought to have been left to the jury to determine if he did it for himself or the company.

If a person accepts a bill in his own name without stating that he accepts as agent, he will be personally liable,* as where a bill was accepted generally by a cashier of a particular company, though he was directed by the drawer to place it to the company's account: [315].

Per. Cur. A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and must be in writing; the drawer contracts that he will pay if the drawee does not, and so does the acceptor, and so do the indorsers. There may be cases where a writing may have all the forms of a bill of exchange, and yet not be so; but then it is where the money is made payable out of a particular fund, as were the cases in 10 Mod. 294. 316; Fort. 281; Stra. 24. 219; 2 Stra. 762; 2 Raym. 1362. 1481; 8 Mod. 265; Stra. 591; 2 Raym. 1361; and if this were within the reason of those cases we should not be for charging the defendant but as a servant; but this case is a plain bill of exchange, the words place it to account of the Y. B. company, and not to the account of the drawer, is an uncommon direction, and shows that it is a bill drawn in favour of the company, but they do not alter the bill with respect to the indorsee, it is the same to him as if they were not there, and then this general acceptance of the defendant is a contract to pay according to the tenor of the bill; but then does the letter of advice vary the case? No, not with respect to the indorsee, for that is always a private transaction, and the person to whom the bill is payable is never cosurant of it; but even that letter is in very general terms; you say it was proved at the trial that the governor and company directed the defendant to accept this bill; but are we to take notice of a transaction that passed between the drawee and a stranger? No. If any other evidence was to be allowed to be given to a jury than what arises on the face of the note, it must have very bad consequences with respect to trade, therefore we can take notice of nothing but what appears on the face of the bill. There are cases reported in 2 Vent. 307; Carth. 5; Show. Rep. 42; Show. Rep. 509. pl. 473; Skin. 264; where

* Unless in the case of an agent, contracting on behalf of government, 1. T. R. 172; see post, tit. Principal and Agent. And even where commissioners under an enclosure act, drew upon the banker appointed by the act. they were personally responsible, because they did not qualify the general terms of their engagement; 5 B. & A. 34.

more appeared on the face of the bill in favour of the defendant than does here, and yet judgment was given for the plaintiff. The circumstances here are equitable circumstances between the company and B., and we do not apprehend that in this case the present plaintiff can charge the company. No doubt but a general acceptance by a bankers servant of a bill drawn on his master, will charge the banker only, but here the bill is drawn on the servant; and in considering bills of exchange, we should not allow a liberty of going into extrinsic circumstances, for the action brought on such bills is not an *indebitatus assumpsit*, but an action brought specially on the custom, which custom arises from the terms of the bill, and the acceptance is an acceptance according to the tenor of the bill, so that the defendant here has accepted it as the bill imports, that is, as a direction to him to pay so much money. Therefore when an action is brought by an indorsee, if we are to allow evidence to be given without the note, there would be an end of bills of exchange, for if the bill itself is not to be an evidence of the contract to him, how should he know what is?—Rule refused. See 5 Taunt. 749; 1 March. 318; Holt. N. P. C. 342; 2 Marsh. 454; 1 T. R. 181; 1 B. & P. 368; Poth. Pl. 118; 3 B. & A. 47; 5 East. 148; 2 East. 142; 3 Esp. R. 266; 1 East. 135; Com. Dig. Attorney, C. 14.

2 LE FEUVRE v. LLOYD. M. T. 1814. C. P. 1 Marsh. 318; [S.]C. by the name of LE FEVRE AND LLOYD. 5 Taunt. 749.

Or where a broker as such draws [316] a bill on a purchaser in favour of his employ or for goods sold by him he is personally liable, unless he sign it as agent.

The plaintiff employed A. to sell for him certain property, which the latter engaged to do, and for that purpose deputed B. who sold the goods, and A. informed the plaintiff that a purchaser was procured who would pay for them by a bill at two months; the purchaser, on receiving the property, accepted a bill drawn on him by B.; but when presented for payment it was dishonored, whereon this action was brought against B's administrator, as drawer of the bill. The Court were of opinion that the rule as to the general liability of the drawer was inflexible, and that in this case, as the bill had been taken in payment, and as the appearance of B.'s name as drawer might have effected a carelessness on the plaintiff's part to investigate the solvency of the acceptor, a rule nisi, which had been obtained for setting aside the verdict given for the plaintiff, was refused.

3. LEADBITTER v. FARROW. M. T. 1816. K. B. 5 M. & S. 345.

So where an agent of a country bank drew a bill on the firm in town, and signed it in his own name, he was holden personally liable, though the plaintiff knew that he was only the agent of the London bank.

Plaintiff wanted a bill on London for 50*l*. and sent to defendant, whom he knew to be agent to the Durham bank at Hexham. Defendant drew a bill accordingly, "Pay to the order of Mr. Leadbitter 50*l*. value received, which place to the account of Durham bank as advised. C. Farron. To Messrs. A. and B. London." In an action thereon defendant urged that he was not personally liable, or at least that the plaintiff, who knew him to be only agent, could not sue him. The point was reserved for the opinion of the Court.

Per Cur. The defendant, in order to protect himself, should have expressed on the bill that he drew it as agent only, or by procuration, or at least that it was for the Durham bank; for the expression "to be placed to the account of the Durham bank as advised," imports nothing more than that the drawer had a credit with the Durham bank to the amount; and that the drawees were to look to that credit. As to the plaintiff's knowledge that the defendant was only an agent, it is to be recollected that this is a contract in writing, founded on the custom of merchants, which cannot be varied by matters lying in parol *dehors* the instrument. Besides it does not follow that because the plaintiff knew the defendant to be agent to the Durham bank, he might not know that he meant to offer his own responsibility. The drawer, by the act of drawing, pledges his name to the bills being honoured. Giving therefore full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable like any other drawer, who puts his name to a bill without denoting that he does it in the character of procurator. The defendant in order to exempt himself from responsibility, ought to show not only that the plaintiff knew him to be an agent, but that he also understood that the defendant was not to

be answerable *ultra*.—Judgment for plaintiff. See *Stra.* 955; *Skin.* 54; 5 *And where*
East. 148; 5 *Taunt.* 749. *an agent,*
having pow
er to draw
bills in his
master's
name,
draws
them after
he is dis
charged,
his princi
pal is liable

4. HARRISON'S CASE. M. T. 1698. N. P. 12 Mod. Rep. 346.

A servant having authority to draw bills in his principal's name, was dismissed, *Holl, C. J.* said, if he draw a bill so soon after his dismissal that the world cannot take notice of his being out of service, or if he were a long time out of his service, but kept so secret that the world cannot recognize it, the bill in those cases shall bind the master.

5. BOULSON V. WILLESSEN. M. T. 1797. K. B. Comb. 450.

An apprentice drew his note—"I promise to pay such a sum for my master." It was holden the master could not be charged in the absense of an authority precedent, or a consent subsequent, or proof that he had managed his master's affairs. See *post, tit. Principal and agent, Master and Servant.*

(B) ALIENS.

1. WILLISON V. PATTESON. E. T. 1817. C. P. 7 Taunt. 439; S. C. 1 Moor 133.

It appeared that the defendants were merchants trading in London, and as such had possession of certain goods belonging to A., a foreigner resident at Dunkirk. A assigned his property in the goods to B., also a foreigner, and residing at Dunkirk, who thereon drew a bill of exchange on the defendants, and indorsed it to the plaintiff, who is a subject of England, then, and now, residing in Dunkirk. At the period of drawing, accepting, and indorsing of the bill, the states of England and France were at war, but peace had been restored before, and was existing at, the commencement of this action. The jury returned a special verdict; and on its coming before the Court, *Gibbs, C. J.* said, this case has been argued on the ground, that the legality of the contract is established by the case of *Antoine v. Morshead, post, 318*; but that case is strongly distinguishable from the present, from the circumstance, that in that case the bill was drawn by and in favour of an English subject, for the purpose of subsistence; and, though indorsed to an alien, was not sued on till the return of peace; whereas the bill in question was absolutely concocted by alien enemies and during open war, and we cannot conceive that a subsequent indorsement can obviate the difficulty raised by the statute, which was passed in order to defeat the commercial intercourse between this country and one in an inimical state, and which would be entirely evaded, if a subsequent negotiation to a British subject were held sufficient to insure its ultimate effect.—Rule absolute for nonsuit. See *ante, vol. i. p. 462.*

2. DUHAMMEL V. PICKERING. E. T. 1817. K. B. N. P. 2 Stark. 90.

Defendant was a prisoner of war in France in 1795, and drew bills on one A. B. in England, payable to C. D., an alien enemy, residing in France. By 34 Geo. 3. c. 9. s. 4. it is enacted; that if any person shall psy any bill drawn in France during the war, he shall be liable to forfeit double value, and payment be annulled. On the peace in 1802, it was a question, whether these bills could be recovered on. *Lord Ellenborough, C. J.* said, they were void in their creation, and could not be enforced in this country.

3. ANTOINE V. MORSHEAD. T. T. 1815. C. P. 1 Marsh. 559; S. C. 6 [318]
Taunt. 237.

This was an action by the indorse of a bill of exchange drawn under the following circumstances. A., a British subject, being detained a prisoner at Verdun in France. in consequence of the war, drew on the defendant the bill in question, payable to another British subject, also a prisoner, and indorsed them to the plaintiff, a banker at Verdun, and subject of France. The defendant accepted the bill. On a verdict being found for the plaintiff. rule nisi for a new trial was moved for, on the ground that the bill could not be legally indorsed to the plaintiff, he being an alien enemy. But *Gibbs, C. J.* distinguished this in principle from the cases cited for the defendant; he said, that the rule established by the cases in which alien enemies were parties to contracts, tended to make void all engagements by which the trade of the hostile country might be benefitted; whereas the bill in question was drawn not only by, but in favour of British subjects, perhaps in order to their sub-

A bill of ex
change
drawn by
an alien re
siding in a
hostile coun
try;

Or in favor
of an alien
enemy,
cannot be
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But where
a bill of ex
change was
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ing a war
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favour of
British sub
jects, priso
ners in the
hostile
country, it
was holden
that an ali
en indorsee
might reco

ver on such bill, after the re-establishment of peace.

sistence, and was indorsed to the plaintiff as the only mean of rendering it available. He considered the bill good as against the defendant; and as the crown might have put it in action during the war, the plaintiff being, on the cession of war, relieved from the incapacity to which the national hostilities subjected him, was reinvested with his natural right to recover.—Rule refused.

So an indorsee in trust for the drawer, an alien enemy, may sue.

4. DAUBUZ V. MORSHEAD. M. T. 1815. C. P. 6 Taunt. 332.

To an action against the acceptor of a bill of exchange, the defence was that it was drawn in favour of an alien enemy, for whom, as to the major part of the bill, the plaintiff sued only in trust. But *Gibbs. C. J.* thought this objection unavailable, and directed a verdict for the plaintiff, leaving the crown to assert its own right, if it should be thought that any had attached.—Verdict for plaintiff. The Court afterwards refused a rule to set the verdict aside.

(C) CORPORATIONS.*

Assumpsit will lie against a trading corporation as acceptors of a bill where a power of accepting is vested in them by statute;

[319]

1. MURRAY V. THE EAST INDIA COMPANY. M. T. 1821. K. B. 5 B. & A. 204. This was an action of *assumpsit* brought against the East India Company as acceptors of a bill of exchange. It was contended that although the power of defendants to draw and accept bills was recognised and regulated by the 9 & 10 W. 3. c. 41., and the 53 Geo. 3. c. 155. ss. 57 & 58 it by no means followed that the remedy which the law gave for the breach of a parol promise would apply against a corporation, as parol promises could be made only by the members of a corporation and not the body corporate, and that the proper remedy was by a bill in equity. But the Court were clearly of opinion, that if an act of parliament authorize a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate as the law gives in other cases against any parties to a bill.

But where the act in incorporating a company does not contain any express power, enabling them to become parties to bills of exchange or promissory notes, and there is no thing in the purpose for which the corporation is established, from which it is to be implied that such a power was meant to be given, no action can be maintained against them as acceptors of a bill

2. BROUGHTON V. THE COMPANY AND PROPRIETORS OF THE MANCHESTER AND SALFORD WATER-WORKS. M. T. 1819. K. B. 3 B. & A. 1. S. P. WIGAN V. FOWLER. 1 Stark. 459.

Action against defendants as acceptors of two bills of exchange, payable three months after date. Demurrer; in support of which it was urged that they were not liable, being only incorporated for carrying on certain water-works. One of their acts authorised them to borrow money to a limited extent *upon bonds under their common seal*, but *no other* power was expressly given, nor was such power necessary for the purposes for which they were established. The Court thought that the Bank acts (6 Anne, c. 22. s. 9. and 15 Geo. 2. c. 13. s. 5.) which directs, "that no partnership exceeding six partners shall borrow, owe; or take up any money on their bills or notes payable on demand, or at any less time than six months from the time of borrowing," were an answer to the action, and observed, the defendants are only a corporation for supplying the towns of Manchester and Salford with water; and as no express power is given to them to draw or accept bills, we should doubt very much (even if the Bank acts were entirely out of the question,) whether such a corporation would have any power so to bind themselves for purposes foreign to those for which they were originally established. But without determining that point, this case seems to us to be clearly within the prohibitions of the several acts passed for the protection of the Bank of England. The object of the legislature was not to prevent other corporations from borrowing money on promissory notes or bills of exchange, but only to prevent them taking up money on bills and notes of such a description as might come in competition with those of the Bank of England. That corpo-

* Corporations, by the intervention of their agents, may be parties to a bill. But by 6 Anne, c. 22. s. 9. and 15 Geo. 2. c. 13. s. 5. it shall not be lawful for any body politic or corporate, other than the Governor and Company of the Bank of England, or for several other persons united in covenants, in co-partnership, exceeding the number of six persons in England, to borrow or take up any sum of money on their bills or notes, payable at demand, or at any less time than six months, from the borrowing thereof, during the continuance of the privilege of exclusively banking, granted to the Governor and Company of the Bank of England; *sed vide*, stat. 7. Geo. 4.

ration issues notes payable on demand, and discounts bills at short dates. The accepting of bills, or issuing of promissory notes, payable at such short dates, by other corporations, would infringe upon the exclusive privileges given to the Bank of England by the legislature. The case of *Wigan v. Fowler*, (1 Stark. 459.) which has been cited, is easily distinguishable from the present; as the fact that the partnership of the acceptors consisted of more than six persons, did not there appear on the face of the bill, and was unknown to the plaintiff; and it is a rule, that where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, as in that case, there, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person; whereas here the defendants are made a corporation by a public act of parliament, and every person is bound to take notice of that act; and when, therefore, a holder of a bill, though a *bona fide* indorsee, takes the defendant's acceptance, he must know that they are a body corporate, and he therefore receives it knowing it to be the acceptance of a corporation prohibited from owing money on such a bill; he is not, therefore, an innocent indorsee, because he takes a bill which he knows to be prohibited by statute. See 3 P. Wms. 419; 2 Burr. 1216; 1 Bl. 295; 5 Taunt. 794; 1 Stra. 18; 16 East. 6.

3. *SLARK v. HIGHGATE ARCHWAY COMPANY*. M. T. 1814. C. P. 5 Taunt. 792.

Defendants were, by 52 Geo. 3. c. 146. (local and personal), incorporated and authorised to borrow money to complete their works; they gave a note under their common seal, at two months after date, for 1000*l.*, payable to Nash or order. It did not import to be for money borrowed to complete their works. Plaintiff sued thereon as indorsee. Defence, that it was given for Nash's accommodation; not to complete their works. Gibbs, C. J. thought this no offence against an innocent indorsee, who paid the value, and the plaintiff had a verdict; but on a rule *nisi* for a new trial, the Court, without assigning their reasons, made the rule absolute.

(D) EXECUTORS AND ADMINISTRATORS.

1. *CHILDS v. MONINS*. H. T. 1821. C. P. 5 Moore. 282; S. C. 2 B. & B. 460.

To an action on a promissory note, the defendants pleaded that they were executors of T. T. deceased, and as such had made the note in question, as follows—"As executors to the late T. T. of, &c. we severally and jointly promise to pay to Mr. N. C., the plaintiff, the sum of, &c. on demand, together with lawful interest for the same. Signed J. M., P. B., executors." Demurrer, that the terms of the note expressed its consideration to be a debt due from the defendants, and not from T. T., and that the defendants had admitted the possession of assets, and that the defendants had therefore rendered themselves personally liable. Joinder in demurrer. *Per Cur.* If this case were to be determined on the exclusive expression "as executors," the defendants would be discharged from their individual responsibility; but we must collect the sense of the instrument from its terms as a whole. The defendants might have promised payment "out of the estate of T. T.," whereas they have not only promised jointly and severally, which executors do not usually do, but also to pay with interest. We think that this latter circumstance clearly imposes on the defendants a personal liability, as the interest could not be charged to the testator's estate; and as we cannot separate the tenor of one part of the bill from that of another. Besides these considerations, great fraud might be a consequence of an executor being suffered to give bills or notes of a date exceeding the appropriation of a testator's assets. Judgment for plaintiff.

2. *KING v. THOM*. M. T. 1786. K. B. 1 T. R. 487.

The plaintiffs, declared that A. who was the payee of a bill of exchange, indorsed it to them in their right as executors, by means whereof the defendant, the acceptor, became liable to pay to them, as executors. The declaration also contained counts for money had and received by the defendant to the use of the plaintiffs as executors, and a count on an account stated with

payable at a less time than six months, it being a case within the prohibition of the several acts passed for the protection of the Bank of England.

[320] And even where a corporation is empowered by statute to raise money by notes for a special purpose, if it is sue notes at less than six months date, without stating they were given for that purpose, the corporation may resist payment, on the

ground that they were given for another object.

If executors give a promissory note payable with interest, on demand, they are personally liable, though they make it expressly "as executors," and though they have fully administered the testator's assets.

[321] So if they indorse a bill or note or if it be

indorsed to them as executors, they may sue upon it as such.

the plaintiffs as executors. The defendant demurred specially, but judgment was given for the plaintiffs; the Court being of opinion, that upon a bill payable to several executors, they might sue in that character, and that no inconvenience could arise from their indorsing the bill; for if they indorse they are liable personally, and not as executors, for their indorsement would not give a right of action against the effects of the testator.

And it has been holden, that if A. empowered by an executor to settle the concerns of the estate, accept in the name of the executor a bill, drawn by a creditor, he there by binds the executor personally.

3. HOWARD v. BAILLIE. H. T. 1796. C. P. 2 H. Bl. 618.

The plaintiffs being the drawers of a bill of exchange upon the defendant as executrix, payable to their own order, which bill was accepted for the defendant by one Thornton *per procuration*. A verdict having been found for the plaintiffs, on a motion being made for a new trial it appeared, that Thornton had been appointed by a power of attorney. *to pay, discharge, and satisfy debts agreeable to the due order and course of law; and to do such further lawful and reasonable acts for the better performing the powers and authority intended to be given as to them should seem meet, and to give him full and whole power and authority to do and act, to all intents, constructions, and purposes, as she, as executrix, could do if personally present, undertaking to ratify all that he should lawfully do.* At the trial it was proved that the defendant knew that Thornton had accepted the bill in question, in her name, in payment to the plaintiffs of a debt due to them; and when the officer served her with process, she acknowledged the justness of the debt, saying that the plaintiffs had behaved handsomely, and should be paid. After argument, the Court were of opinion that the authority conveyed to Thornton a sufficient power to accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, thereby making the executor personally liable, on the ground that an authority of this nature necessarily included all intermediate powers; that is to say, all the means necessary to be used in order to effect the accomplishment of the object of the principal, namely, the paying, satisfying, and discharging the testator's debts.—Rule discharged.

But in a subsequent case it was determined under a power of attorney to act for an executor as such, that [322] the party cannot accept bills, so as to bind the executor personally.

4. GARDNER v. BAILLIE. H. T. 1797. K. B. 6 T. R. 591.

In an action on a bill of exchange, it appeared that one Thornton acted under a letter of attorney, and accepted the bill in question for a debt due from the defendant's testator. The power of attorney, after reciting that she had been appointed executrix, empowered Thornton, for her, and in her name, as executrix, and agreeable to the due course and order of law, to pay all debts, &c. due from her as executrix, whether on mortgage, bond, bill, note, or otherwise, and generally for her, as executrix, to do all such further acts for receiving debts and discharging, &c., and to act as she as executrix could do. At the trial the plaintiff tendered evidence to prove that the defendant had paid other bills drawn on her account by Thornton, who acted under this power; but the presiding judge rejected this evidence, nevertheless a verdict was found for the plaintiff. On motion to set it aside, it was contended, that as Thornton was authorised to receive and pay all sums due to and from the defendant, and generally to do all further and other lawful and reasonable acts as to him should seem proper, he had power to bind the defendant by accepting a bill of exchange on her account, it being for a legal debt due from her as executrix.

But the Court, after consulting with the judges of the Common Pleas, were of opinion that the executor was not personally liable, and that a power of attorney given by an executrix to act for her as an executrix, did not authorise the attorney to accept bills to charge her in her own right, though for debts due from her testator.

(E) INFANTS.

1. WILLIAMS v. HARRISON. M. T. 1690. K. B. Carth. 160; S. C. 3 Salk. 197.

A bill given by an infant in the course of trade;

In an action against the defendants as drawers of a bill of exchange, one of them pleaded infancy; on demurrer, the Court overruled the demurrer, on the ground that the plea was a good bar, the bill having been given in the course of trade.

2. WILLIAMSON v. WATTS, Spinster. M. T. 1808. N. P. 1 Campb. 551. S.

P. WILLIAMS v. HARRISON. M. T. 1690. K. B. Carth. 160.

Action on a bill of exchange; plea, infancy; replication, that the bill was accepted for necessaries. Issue thereupon. When the case was opened, Sir James Mansfield held, that as an infant could not accept a bill, the action was not maintainable. The replication, he observed, was absurd, and ought to have been demurred to.—Plaintiff nonsuited. See *Williams v. Harrison*, Carth. 160; *Trueman v. Hurst*, 1 T. R. 40; *Bartlett v. Emery*, ib. 42; Co. Litt. 172. a.

Or even for necessaries cannot be enforced.

S. TRUEMAN v. HURST. M. T. 1785. K. B. 1. T. R. 40.

Declaration on a note whereby the defendant acknowledged himself to be justly indebted to the plaintiff in the sum of 10*l.* for board, lodging, and for teaching and instructing the defendant in the business of hair dressing; and after the common counts, there was a count on an account stated; the defendant pleaded infancy, and the plaintiff replied that the note was given for necessities, to which replication the defendant demurred; and it was argued for the defendant that an infant could not bind himself by a promissory note, even for necessities, and that there was a great difference between a single bill and a promissory note, because an action on the first must be brought in the name of the person to whom it was given, in which case the consideration may be gone into; whereas a promissory note is negotiable. But the Court desired the counsel for the plaintiff to confine himself to the objection to the account stated, from which it has been observed (*Bayley on Bills*, 494.) that it may be inferred that they considered that the action on the note was sustainable. See *Holt. N. P.-C.* 78. 79.

Though it has been thought that a note given by an infant for necessities is valid [223]

4. GREY v. COWPER. E. T. MS. cited 1 Selw. 299.

It has been holden that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the action.

5. TAYLOR v. CROKER. T. T. 1802. K. B. N. P. 4 Esp. 187.

Action against the acceptor of a bill drawn by E. and J. on the defendant, and payable to their own order, and indorsed by them to one S. and by him to the plaintiff; it appeared that both the drawers were infants. But *Lord Ellenborough, C. J.* held that such an objection was no defence to the present action, though it might have been had it been brought against the drawers themselves.

The privilege is confined to the infant,

For in an action by an indorsee it is no defence for the acceptor to say that the drawer is an infant,

6. JONES AND OTHERS v. DARCH AND OTHERS. T. T. 1817. Ex. 4 Price. 300.

This was an action on a bill of exchange against the defendants as acceptors it appeared that the payee and first indorser was an infant. The jury having found a verdict for the plaintiffs on evidence that showed that the defendants knew when they accepted it that the payee was an infant, and that he had in fact indorsed the bill before they accepted it, and also that the defendants had been in the practise of raising money on similar bills. The Court refused to disturb the verdict, on the ground that an infant could not by his indorsement give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it if brought before them in a case not so peculiarly circumstanced.

And where a bill was made payable, to an infant, it appearing that the acceptors knew the

fact, and had been in the habit of raising money on similar bills, the Court refused to permit them to avail themselves of the objection.

7. GIBBS v. MERRILL. M. T. 1810. C. P. 3 Taunt. 308.

A. B. and one C. D. who was an infant, accepted a bill. In an action on the bill brought against A. B. only, he pleaded that he did not undertake unless jointly with C. D. Replication that he did undertake, &c.; plaintiff proved C. D.'s infancy, and the defendant proved by C. D. that he had never disaffirmed the acceptance. The jury found for the plaintiff, but on a rule nisi for a new trial, the Court held C. D.'s acceptance voidable only, not void, and that the issue should have been found for the defendant. See 4 Taunt. 468; 14 East. 214; 3 Esp. 76.

The acceptance of an infant is voidable only, not void.

8. STEVENS v. JACKSON. H. T. 1815. C. P. N. P. 4 Campb. 164.

On the question as to the validity of a petitioning creditor's debt, it was proved that the plaintiff had accepted the bill in question, payable to the peti-

So if he accept a bill after he is of full age, though the bill be

(324)
drawn on
him while
an infant,
he will be
liable.

Where the
maker of a
promissory
note after it
is due pro-
mises to
pay, it is
no defence
to show
that the

tioning creditor, that the bill had been drawn while he was an infant, though he had not accepted it till after he arrived at the age of 21.

But *Gibbs C. J.* was of opinion that the debt was good, inasmuch as the acceptance was binding upon the plaintiff.

(F) MARRIED WOMEN.*

COTES v. DAVIS. M. T. 1807. N. P. 1 Campb. 484.

Action by the indorsee against the maker of a note, made payable to a married woman, who indorsed it in her own name. Defence, that the payee was a *feme covert*; proof, that the defendant promised to pay when the note was presented for payment.

Lord Ellenborough, C. J. said, he would presume, after the promise to pay by the defendant, that she had authority from her husband to indorse bills as his agent.

payee is a married woman, for the Court will presume she had authority from her husband.

(G) PARTNERS. See *post*, tit. Partners.

1. *PINKNEY v. HALL.* H. T. 1696. K. B. 1 Salk. 126; S. C. 1 Lord Raym. 175.

By the cus-
tom of mer-
chants.

It was held in this case by the custom of England, that where there are two joint traders, and one accepts a bill drawn on both for himself and partner, it binds both if it concern the trade; otherwise if it concerns the acceptor only, and in respect of his own separate debt.

2. *MASON v. RUMSEY, SEN. AND RUMSEY, JUN.* T. T. 1808. N. P. 1 Campb. 384.

One part-
ner may,
in general,
bind his co-
partners by
a bill or
note,

Action against acceptors of a bill of exchange drawn upon A. and Co., and A. junior wrote across it "accepted, A. senior." The present action was defended by a junior, who insisted that if he was a partner, which he denied, such an acceptance would not bind him.

But *Lord Ellenborough, C. J.* said, if the defendants were partners, they were both bound by this acceptance, and that the word "accepted" alone, would have been sufficient to bind the firm.

(H) SEVERAL PERSONS NOT IN PARTNERSHIP.

If a bill is drawn upon several persons not in partnership, an acceptance by one will bind him *only*, and not his co-contractor. Bul. N. P. 279.

See 1 Campb. 403; *Holt. N. P. C.* 474; *Doug.* 653.

(I) EFFECT OF A PERSON BECOMING A PARTY TO A BILL OR NOTE.

WITHERLEY v. SARSFIELD. M. T. 1690. K. B. 1 Show. 127; S. C. 2 Vent. 292; S. C. *HOLT.* 112; S. C. *Carth.* 82; S. C. *Comb.* 45. 152.

[325]
If a gentle-
man nego-
tiate a bill
or note, it
will make
him so far
a merchant
as to ren-
der him re-
sponsible
for its pay-
ment.†

The plaintiff declared in assumpsit upon the custom of merchants, that if any merchant or other trading person make and direct any bill of exchange to another, payable to any merchant, or any other trading persons, and the same bill be tendered, and for want of acceptance be protested, that in such a case the drawer by the custom is chargeable to pay, &c. That the defendant at Paris did draw a bill on his father here in London, payable to the plaintiff; that the same was presented, and dishonored; and he, according to the custom, *protestavit sive protestari causavit prædict billam*, &c. whereby he became chargeable, and in consideration of the premises did assume, &c. The defendant pleaded that he was a gentleman, the son and heir of Dr. Thomas Witherley, and at the time of drawing the bill was a traveller. and at Paris for his better education, &c. And that he was neither then, nor any time from his birth hitherto, a merchant or trader, or did ever deal as such, and that he was then at Paris as a gentleman and traveller, as aforesaid. *Absque hoc* that he is or ever was a merchant, or person trading by way of merchandize between Paris and

* Bills or notes cannot be legally made or accepted, by a *feme covert* unless where she acts by authority of her husband. *Barrow v. Bishop*, 1 East. 432; S. C. 3 Esp. 266. abridged *ante*, 35; or where her husband is under some civil disability; see *Ld. Raym.* 147. *Salk.* 116; *Blac.* 1197; 1 T. R. 6; and a note given to a *feme covert* vests in the husband, though she be a sole trader; *ante*, p. 35; and he may sue upon such a security without her indorsing it; *ante*, p. 38.

† An attorney, we have seen, does not, by accepting a bill, lose his privilege from being sued by bill; *Camerford v. Price*, *Doug.* 212. abridged vol. ii. 541. 544. 546. 554. 563.

London, *vel alibi ubicunque prout*. The plaintiff supposes. *Et hoc paratus est verificare*. On demurer, assigning for cause that the plea amounted to the general issue, and double, &c. The defendant had judgment. On error in the Exchequer Chamber, the Court said, this drawing a bill must certainly make him a trader for that purpose, for we have all bills directed to us, or payable to us, which must be all avoidable if the negotiating a bill, whether the party be a merchant or not, did not render him liable.

VII. RELATIVE TO THE CONSIDERATION* OF A BILL OR NOTE.

(A) WHEN REQUISITE AS BETWEEN IMMEDIATE PARTIES.

1. JEFFERIES v. AUSTIN. M. T. 1725. K. B. 1 Stra. 674. S. P. RICHMOND v. HEAFY. 1 Stark. 202.

Action upon a promissory note by the payee against the maker. Raymond, C. J. permitted the defendant to prove that it was delivered in the nature of an escrow, viz. as a reward in case he procured the defendant to be restored to an office, which it being proved he did not effect, there was a verdict for the defendant.

As between the original or immediate parties, to bill or note the absolute want of a consideration;

2. SOLOMON v. TURNER. T. T. 1815. 1 Stark. 51.

Payee against maker of a note; it was proposed, on behalf of the defendant, to prove that the note had been given at the stipulated price of a picture, and that the sum charged was more than it was really worth. Lord Ellenborough refused to receive the evidence, but offered to allow the defendant to prove circumstances indicatory of fraud, in order to defeat the contract altogether.

[326]
Or fraud ;

See 7 East. 483; 1 Campb. 40; 2 Campb. 346; Peake. 216.

3. MORGAN v. RICHARDSON. M. T. 1807. N. P. 1 Campb. 40.

This was an action upon a bill of exchange, by the drawer against the acceptor. Lord Ellenborough admitted that where the consideration of a bill entirely fails, it would be a good defence in an action upon it between the original parties.

Or total;

4. LEDGER v. EWEE. T. T. 1794. N. P. Peake. 283. S. P. BARBER v. BACK-HOUR. E. T. 1691. N. P. Peake. 86.

In an action by the payee of a bill against the acceptor, the consideration appeared to be that the plaintiff had taken the defendant into partnership, but on the defendant's friends advice, he broke off the connexion; there was evidence of fraud on the plaintiff's part in drawing the defendant into the engagement which Lord Kenyon left to the jury; but he told them if they were against the defendant on the evidence of fraud, they should take into consideration the damages the plaintiff had really sustained by the non-performance of the contract, and were not obliged to find the whole amount of the bill. The jury, however, found for the defendant.

Or partial failure of consideration may be shown;

5. GREW v. BEVAN. E. T. 1822. 3 Stark. 134.

Payee against acceptor. The plaintiff was the landlord of premises let to D. and had distrained for rent alleged to be due. The defendant who claimed D.'s goods under a bill of sale, gave the acceptance in question, to prevent the plaintiff from proceeding to a sale; it was proved that no rent was legally in arrear at the time of the distress.

Or that nothing was due to the plaintiff when the bill was given.

* A bill or note it has been shown, *ante*, p. 255. n. is *presumed*, to have been made upon a good & valuable consideration, a presumption of law essential to the unrestricted negotiation of such securities. Hence the rule is universal, that where the holder of a bill or note has given a consideration to the person from whom he immediately received the instrument any preceeding party when sued upon it cannot protect himself by showing that he had no value of the party to whom he gave it; for by making himself a party to the instrument, he contributed to its currency, and there is no difference in this respect whether the person who gave a good consideration, knew that the security was actually given, without an equivalent or not, unless he also knew the party from whom he received it, was acting fraudulently. But on the other hand, the want of consideration, or an adequate equivalent, will be a sufficient defence to an action by one party against another, from whom he has immediately received the instrument. And consistently with this rule, as between the original parties the *total failure* of consideration may be set up as a defence. Or it may be shown that the contract on which the bill was given is *wholly* rescinded where it is entire, or that it has been *partially* rescinded where it consists of divisible parts.

Hence if a party accept a bill [327]

without value for the accommodation of the plaintiff, he may resist the payment altogether, or he may show that

Or for the accommodation of some person for whom the plaintiff was trustee;

Or it may be proved that the plaintiff an indorsee knew it to be an accommodation bill or note, and that he only gave part of the money for which it was made;

But if there be a valuable consideration between the payee and acceptor of [328]

a bill of exchange, it is not to be considered an accommodation bill, although there be none between the payee and drawer; Or it may be proved that the contract upon which the bill or

Best, J. left it to the jury to determine whether the distress was fraudulently made to obtain the acceptance from the defendant, or to recover the amount of rent *really and bona fide* due.

6. DARNELL v. WILLIAMS. T. T. 1817. 2 Stark. 166.

Payee against acceptor of a bill; it was proved that when the bill was presented for acceptance, he objected to the sum, and said that he had only agreed to accept a bill for a part of the amount; but the plaintiff urged him to accept it for the full sum as a matter of accommodation. The part admitted to be due had been paid into court.

Per Lord Ellenborough. Although as to third persons the defendant would be liable to be sued for the full sum, he cannot as between these parties be liable for more than the amount of the actual consideration. Plaintiff nonsuited, it was partly for value and partly for the plaintiff's accommodation.

7. JONES v. HIEBERT. M. T. 1818, 2 Stark. 304.

Defendant accepted a bill for 415*l.* to accommodate Phillips, & Co. indorsed it to their bankers for value, and became bankrupts; the bankers knew it to be an accommodation acceptance; and their demand against Phillips and Co. was 265*l.* only; in an action by them upon this acceptance; it was held that they could only recover the 265*l.*; and they had a verdict accordingly.

8. WIFFEN v. ROBERTS. H. T. 1795. 1 Esp. 261.

This was an action by the indorsee against the drawer of a bill of exchange accepted by one Yates. The defence set up was, that the bill was an accommodation one, and that the defendant had not paid full value for it. Lord Kenyon said, that where a bill of exchange is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such cases the indorsee, though he has not given the indorser the full amount of the bill, yet he may recover the whole, and be holden for the overplus above the sum really advanced to the use of the indorser. but when the bill is an accommodation one, and that known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid on the bill.

9. SCOTT AND OTHERS v. LIFFORD. H. T. 1808 N. P. 1 Campb. 246.

Action by payee against drawer of a bill of exchange. It appeared A. having an acceptance due to plaintiffs, wished it renewed. Plaintiffs assented, on condition that defendant would draw a bill upon him for the same amount; the bill was accordingly drawn and accepted. Defence, that no consideration was given for the bill. Lord Ellenborough held the bill not to be an accommodation bill, inasmuch as there was no consideration between the payee and acceptor. Verdict for plaintiff.

10. LEWIS v. COSGRAVE. T. T. 1809. C. P. 2 Taunt. 2.

It appeared in this case that the defendant had purchased of the plaintiff a horse, warranted sound, and had given a draft on his banker for the price; but finding after that the horse was unsound, he immediately offered to return the animal, which the plaintiff refused to accept; and having returned it to the defendant, the latter again sent it back, and had it placed in the plaintiff's stable. In an action on the check, the jury under the direction of the judge, found for the plaintiff. On a rule nisi for a new trial, it was urged for the plaintiff that whether or not the horse were sound, as the plaintiff declined receiving it back, the defendant could not resist the payment of the price, but must resort to his remedy for failure of his warranty. For the defendant it was contended, that as the check was given in consideration of a sound horse, it must, on the horse proving unsound, be void; and that as to the refusal of the plaintiff to receive back the horse, the offer of the defendant was sufficient, and that the defence in this case must be governed by the practice adopted in actions for goods sold and delivered, where, if the goods are proved to be on delivery inferior in quality to those bargained for, and the purchaser has offered to return them, the courts usually nonsuit the plaintiff. The Court fully concurred in the arguments for the defendant; and being of

opinion that the plaintiff was aware of the unsoundness of the horse at the time of sale, made the rule absolute. *See Doug. 23. Cowp. 818; 1 T. R. 133.*
 11. *MOGGRIDGE v. JONES.* M. T. 1811. K. B. 14 East. 486; S. C. 3 Camp. 38.

Drawer against the acceptor of a bill. The plaintiff agreed to let a house to the defendant for 21 years, and in consideration of 500*l.* to be paid by three bills to be drawn by the plaintiff, and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted accordingly, and the defendant was immediately let into possession; but the plaintiff afterwards refused to execute the lease; it was urged, therefore, that the consideration had failed. But Lord Ellenborough, and afterwards the Court, on a motion for a new trial, held, that this was no defence to the action; that the defendant was bound to pay the bills, and might have his remedy on the agreement for non-execution of the lease. *See Broom v. Davis*, cited 7 East. Rep. 480; and *Basten v. Butter*. 7 East. Rep. 479. and the cases therein cited; and post, tit. Cross Actions.

12. *MORGAN v. RICHARDSON.* 1 Campb. 40. n. cited 7 East. 482. S. P. Recognized *FARNSWORTH v. GEERARD.* 1 Campb. 38. *FLEMING v. SIMPSON.* M. T. 1806. 1 Campb. 40. n. *TYE v. GWYNNE.* 2 Campb. 346.

To an action by the drawer against the acceptor of a bill drawn payable to the drawer's order. The defence was, that the bill had been accepted for the price of some hams, and that they had proved to be so bad, as to be almost unmarketable. The sum for which they were actually sold, was paid into court. Lord Ellenborough held that this partial failure of consideration was no defence to this action, but that the defendant must resort to his cross action. *See 1 Esp. 43; 2 Camp. 63; 1 Camp. 377; 4 Camp. 119.*

13. *GRANT v. WELCHMAN.* M. T. 1815. K. B. 16 East. 207. *LEDGE v. EWER.* T. T. 1793. Peake. 216. *Contra.*

Payee against maker, on note for 6*l.* of three years standing; defence, first, that it was in part for an apprentice fee; and that the apprenticeship was for less than seven years; secondly, that a year before the action, the apprentice was discharged, because plaintiff had enticed him to commit felony; *Graham, B.* over-ruled both objections; and on motion for nonsuit, the court answered to the first objection, that the apprenticeship was voidable only, not void; and on the second, they inquired how the consideration for the apprentice was reserved; and it appearing that it was all to be paid at the time of the binding, but that the note was taken as an indulgence, they thought that decisive against the defendant, and refused the rule.

14. *PORLEWELL v. WILSON.* H. T. 1720. K. B. 1 Stra. 260.

A. gave a note to pay a certain sum to B. for a debt due from C. to B.; and on error it was objected that the debt of a third person was no consideration, but they affirmed the judgment.

15. *SEDDONS v. STRATFORD.* T. T. 1794. N. P. Peake. 215.

This was an action by the indorsee of a note against the payee, and first, indorser; counts on the note, money paid, &c. It appeared the consideration for which the bill was first given, was illegal; the defendant had indorsed the bill to Clode, who was aware of the illegality of the consideration; and Clode offered it to Cowley in purchase of some goods, but Cowley refused to trust him unless he got some other person to indorse the note. Clode prevailed upon the plaintiff, and then Cowley received it. Plaintiff paid the money; it was proved that plaintiff knew the illegality of the consideration; this, the defendant contended, was fatal to plaintiff's right of action; but Lord Kenyon said a volunteer who has been compelled to pay money for the benefit of another, can recover it from the person on whose behalf he has paid it. The plaintiff was compelled to pay Cowley, who came properly by the note, and therefore

* Or a moral or even an honorable obligation; 5 Taunt. 36; 3 Taunt. 311; would suffice as a debt barred by the statute of limitations; Ld. Raym. 389; 6 Mod. 309; 2 Bl. Rep. 703. or a debt from which the defendant has been released, by the effect of an insolvent act, or bankruptcy and certificate; Cowp. 290. 544; 1 T. R. 715.

note was given, has been partly or wholly rescinded.

But the sum as to which the consideration fails, must be of a specific liquidated amount.

And therefore it is no answer to an action on a bill or note, that the goods for which the instrument was given were unsound;

Or that it was given for an apprentice fee, and that the apprenticeship has been dissolved for misconduct in the master.

Even between immediate parties, the debt of a third person is a sufficient consideration.*

Although a note be originally given for an illegal consideration, yet if a volunteer put his name to it at the request of the holder, and is compelled to pay

it, he may recover the amount from the person on whose behalf he paid it, in an action for money paid &c. it is evident that plaintiff can recover from the party on whose behalf he paid the money, &c. neither party is injured by it.—Verdict for plaintiff.

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amount from the person on whose behalf he paid it, in an action for money paid &c.

The want of a consideration is no defence, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note upon a valid consideration before it was due.

Even although it can be shown that the plaintiff knew of the inadequacy of consideration at the time he became holder.

Hence it is no answer to an action by an indorsee against an acceptor, that it was an accommodation bill, and that the plaintiff was cognizant of the fact.

Unless fraud can be shown, and notice of intention

(B) WHEN REQUISITE AS BETWEEN INTERMEDIATE PARTIES.

MORRIS v. LEE. H. T. 1134. K. B. Cited Bayl. 397 ; S. C. 1 Com. Rep. 43. S. P. MEREDITH v. SHORT. E. T. 1701. K. B. 1 Salk. 25 ; S. C. by name of MEREDITH v. CHUTE. 2 Ld. Raym. 759. CROWLEY v. CROWTHER. 2 Freem. 257. KING v. MILSON. 2 Campb. 56. REES v. MARQUIS OF HEADFORT. 2 Campb. 574. WYATT v. BOLMER. 2 Esp. 538.

In an action by the indorsee against the maker of a note 13 years old, the defendant obtained a rule nisi to set aside a judgment by default, on an affidavit by a third person that he believed the defendant was swindled out of the note ; an affidavit was produced on the other side that the plaintiff took the note *bona fide*, and gave a valuable consideration for it ; and the Court held, that however improperly it might have been obtained, a third person, who took it fairly, and gave a consideration for it, was entitled to recover, and discharged the rule.

2. COLLINS v. MARTIN. H. T. 1797. C. P. 1 B. & P. 651.

Per Eyre, C. J. No evidence of want of consideration, or other ground, to impeach the apparent value received, was ever admitted in a case between an acceptor or drawer, and a third person holding the bill for value, and the rule is so strict that it will be presumed that he does hold for value until the contrary appear ; the *onus probandi* lies on the defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect such first holder. This doctrine proceeds upon the *argumentum ad hominem* ; it is saying that you have the title, but you shall not be heard in a court of justice, to enforce it against good faith and conscience ; for the purpose of rendering bills of exchange negociable, the right of property in them passes with the bills. Every holder, with the bills, takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negociable ; and in this respect they differ essentially from goods, in which the property and possession may be in different persons.

3. CHARLES AND ANOTHER v. MARSDEN. E. T. 1808. C. P. 1 Taunt. 224. S. P. SMITH v. KNOX. 3 Esp. 46.

To an action by the indorsee against the acceptor of a bill of exchange ; the defence was, that the defendant accepted it for the use and accommodation of the drawer, and without consideration ; and that the indorsement to the plaintiffs was made after it became due, and with their knowledge that the defendant received no consideration for it. The question came before the Court on demurrer to the pleadings, when the Court said, we must suppose, as the pleadings do not show to the contrary, that the plaintiffs were *bona fide* holders, and as such, are clearly entitled to recover against the defendant, who, notwithstanding he may have received no consideration for his acceptance has by affixing it to the bill enabled the drawer to raise money on his credit. And as to the circumstance of its being negotiated after it became due, we see no good reason why the bill might not be well transferred after that period ; it was the defendant's own neglect that the bill remained in the world after it was due. On the whole the defendant will sustain no injury by our decision against him ; for had he, instead of making a promise, actually advanced the money to his friend, he would have been situated precisely as he is at present.—Judgment for plaintiff. See 1 Campb. 19 ; 1 Stra. 264 ; 3 Esp. 47.

4. PATERSON v. HARDACRE. M. T. 1769. K. B. 4 Taunt. 114. STRONG-ITHARM v. LUKYN. M. T. 1765. 1 Esb. 389.

In an action by indorsee against acceptor, the defence was, that an agent employed by defendant to get the bill discounted, had appropriated it to his own use, and absconded ; it was urged upon this, that plaintiff was bound to

prove how he got the bill, and what consideration he gave for it; he was not prepared with such proof, and was allowed to take a verdict subject to the question, whether he was bound to give it; and on a rule nisi for a nonsuit, on this ground, and time to consider, the Court held that where a defence on the ground of the bill having been lost or found is contemplated, it was incumbent on the defendant to give distinct notice, to the plaintiff that such proof would be called for at the trial; and, because no such notice had been given, the rule was discharged.

5. GRANT v. VAUGHAN. T. T. 1764. K. B. 3 B. & C. 1516. S. P. HINTON'S CASE. 2 Show. 235.

This was an action on a note payable to bearer, which had been lost, and came to plaintiff's hands for valuable consideration. *Per Lord Mansfield.* It is but just and reasonable that if the bearer brings the action, he ought to entitle himself to it on a valuable consideration, and strictly prove his coming by it *bona fide*. See *Chit. Bills*, 147. 6th edit.; 3 B. & C. 466; 4id 330.

6 DUNCAN v. SCOT. M. T. 1807. N. P. 1 Camp. 100.

Action by indorsee against the maker of a bill of exchange. Pleas, *non assumpsit*, and the statute of limitations. Replication to the last, that plaintiff had been out of the realm ever since the cause of action accrued. Evidence of defendant's hand writing, &c. was given, and that when the bill was shown to defendant with the indorsement, he said he knew the bill was not paid. Defence that the defendant gave drawees notice not to pay, as there was no consideration given for the bill. It appeared that the defendant had been induced to put his name to it under duress, and through fear of being murdered. Defendant's counsel contended that plaintiff, under such circumstances, must show some consideration for the bill; to which Lord Ellenborough assented, and said the defendant was not a free agent when he drew the bill, and in the absence of such proof plaintiff must be nonsuited.—Plaintiff nonsuited.

(C) WHEN ILLEGALITY OF VITIATES.

(a) *By common law.*

1. GUICHARD v. ROBERTS. M. T. 1763. K. B. 1 Bi. Rep 445. SCOTT. v. GILLMORE. 3. Taunt. 226.

In an action on a note of hand, the defendant gave in evidence, that the note was obtained upon a smuggling consideration; on which the jury found a verdict for him. On a motion for a new trial, a rule to show cause was granted; and the question being afterwards compromised between the parties, Lord Mansfield took it up again *mero motu*; and declared that it was the clear opinion of the whole Court, that on this action an illegal consideration might be set up as a defence; for every creditor ought, in justice, to prove the consideration on which his contract is founded, and though the law allows bonds and notes to be *prima facie* evidence of a good consideration, without proving it on the part of the plaintiff, yet it ought not to preclude the defendant from showing that the consideration, in fact, is a bad one. See *post*, tit. "Smuggling."

2. WALLACE v. HARDACRE. M. T. 1807. 1 Camp. 45. S. P. COLLINS v. BLANTEN. E. T. 1767. C. P. 2 Wils. 347. DRAGE v. IBERSON. E. T. 1793.

2 Esp. 643. *contra*.

A., the *bona fide* holder of a bill, on which B., the payee, had forged the acceptance of C., gave it up to B. Upon a statement of the circumstances, he received from him a bill accepted by D., without consideration. Held, that A. might recover against D., unless a bargaining to stifle a prosecution for the forgery could be proved. See 3 P. Wms. 279.

3 POOL v. BOUSFIELD. M. T. 1807. N. P. 1 Camp. 55.

Payee against the acceptor of a bill, drawn by M. on the defendant, in favour of plaintiff. M., on being called as a witness, proved that it had been agreed, that on the witness undertaking not to move the Court of K. B. for a mis

* But we have seen that the security for the fair expenses of the prosecution, agreed to be given at the recommendation of the Court of quarter sessions, by a defendant who

Or the bill or note be payable to bearer;

Or has been obtained under duress.

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Whenever the defendant is at liberty to insist on the want of consideration as a defence, he may also object that the consideration was illegal, as that it was for smuggling;

Or compounding a criminal prosecution;

Or in consideration of abstaining from moving the Court against the defendant for a mis

demeanour.*

against the plaintiff, that he might answer the matters of an affidavit, the latter had consented to discharge the defendant, the acceptor. *Lord Ellenborough* held the contract to be corrupt and invalid, and no answer to the action.

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But if there be a civil and criminal proceeding, and the bill or note be only applicable to the former, it will be valid.

4. *HARDING v. COOPER*. M. T. 1817. K. B. 1 Stark. 467.

The bill of exchange in this case had been given by the friend of a discharged insolvent, in compromise to a creditor, and for costs, with consent of the plaintiff, that an indictment against the insolvent should be quashed; no evidence was, however, adduced to show the compounding of the prosecution to have been part of the agreement. *Lord Ellenborough* said, a stipulation to drop the prosecution would, without doubt, have been illegal; but if the civil rights only were compounded, and plaintiff chose afterwards to forgo the prosecution, the transaction was not illegal; and there being no evidence that the costs of the prosecution were mentioned during the negotiation, or included in the amount of the bill, or that there was any stipulation for dropping the prosecution, the plaintiff had a verdict.

5. *PILKINGTON A GREEN AND ANOTHER*. E. T. 1800. C. P. 2 B. & P. 151.

So a bill given to procure a discharge from custody for penalties under the excise laws with the consent of the commissioners;

Assumpsit by an indorsee against the makers of a promissory note. It appeared that Green one of the defendants, having been taken into custody on a conviction by the commissioners of excise in certain penalties and on a warrant directed to an excise-officer, to "take and arrest the body, &c. and forthwith to carry the same to the gaol, &c., where, &c., and the same together with &c., there to deliver into the custody of the said gaoler or keeper of the said gaol or prison, until he shall satisfy or pay, &c." Green being incapable of paying these penalties, gave to the officer, among other notes, that which formed the subject of this action, and was discharged out of custody. The commissioners afterwards sanctioned this act of the officer.

The plaintiff had a verdict, with liberty for the defendant to move to enter a verdict in his favour. On motion for that purpose, the defendant's counsel endeavoured to destroy the plaintiff's right of action, on the ground that the discharge of the officer being illegal, the note was given without consideration, and they cited *Love's case*, Salk. 28. where it was determined that a sheriff cannot discharge a person from execution under a *capias ad satisfaciendum*, and contended that the approbation of the commissioners would not make that legal which was *ipsa natura* contrary to law. But *Eldon C. J.* was of opinion, that as the ratification of the officer's act was given by the persons mainly interested in the caption, the discharge was sufficient consideration for the note.—*Postea* to the plaintiff. See 16 East. 293.

6. *SUGARS v. BRINKWORTH*. T. T. 1814. K. B. 4 Campb. 46.

Or even, it seems, with out their approbation would be legal.

The defendant had been convicted in excise penalties to the amount of 340*l.*, and plaintiff, a supervisor, had a writ to levy the amount. The plaintiff took the defendant's note at two months for the sum; and though he had no previous authority from the commissioners to take it, they approved of it when informed of the fact. For the defendant it was urged, that there might be great abuse if the taking of a note for penalties were allowed; but *Lord Ellenborough* held that the absence of evidence to show that the plaintiff had taken improper advantage of the defendant's situation, the former was entitled to recover.—Verdict for plaintiff.

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A promissory note given to a creditor by a receiver in Chancery in custody for non payment of a balance certified against him, and for certain costs

7. *BRETT v. CLOSE*. M. T. 1812. K. B. 16 East. 293.

A person having a balance certified against him as a receiver, an attachment issued upon it out of the Court of Chancery and he was taken under the attachment, and in order to obtain liberation of his person, gave two notes for the amount of all that he was liable to pay, which the other party agreed to accept. The question now raised was, whether such notes were illegal in respect of the consideration, that consideration, as it was said, involving a contempt of Court *Per Cur.* This process although criminal in its form, stood convicted before them for ill-treating his parish apprentice, for which the parish officers had been bound over to prosecute him, under the statute 38 Geo. 3. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment, to which he would otherwise have been sentenced, is legal; *ante*, vol. ii. p. 41 and 401.

is in reality civil as to all purposes for which it was sued out by the party, and similar to an attachment for non performance of an award, which although criminal in its form, being for the attainment of a civil satisfaction, has been all along treated as a civil process. Then, it is argued, that this is *nudum factum*, in as much as the other parties to the suit are not bound by it, but that does not show it to be *nudum factum*, although perhaps it is a bad bargain, because the party does not reap all the benefit he might expect from it, but remains liable to be taken again. But no person complains of this as a contempt of court, or as fraudulent in its intention; nor is it suggested that there is the least shadow of complaint, by any of the parties interested, on which the Court of Chancery is likely to animadvert. As to the sum given to cover the costs, the parties were obliged in that stage of the proceedings to take it at hazard for an unascertained sum, which would only be good for the real amount when ascertained, and nothing is stated to show that the party has refused to allow for the surplus. See Salk. 28; Yelv. 197; 2 Show. 79; 2 Lev. 203; 1 T. R. 266. 3 id. 23; 4 id. 316; 11 East. 48; 14 id. 468.

(b) *By statute.*† 1. *By gaming.*

1. By the 16 Car. 2. c. 7. s. 3. it is enacted, that if any person or persons shall play at any of the games enumerated in the act, and shall lose any sum or sums of money, or other thing or things so played for, exceeding 100l., at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party or parties who loseth, or shall lose the said monies or other thing or things so played or to be played for, above the said sum of 100l., shall not, in that case, be bound or compelled, or compellable to pay or make good the same, but the contract and contracts for the same, or for part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, any sum of bonds, bills, specialities, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of and for the same or any part thereof, shall be utterly void and of none effect.

By 9 Anne, c. 14. s. 1. it is enacted, that all notes, bills, &c. where the whole or any part of the consideration shall be for money, or other valuable

* And past seduction is a good consideration; 2 P. Wms. 432; Forr. 153; 2 Wils. 339; but not an agreement for future illicit cohabitation; see 15 Ves. 282; 3 M. & S. 463; Barr. 1568; 2 P. Wms. 432; 2 Wils. 339; Amb. 641; Cowp. 742; Forr. 153, 4 B. & A. 650; see post. tit. "Seduction;" or in restraint of marriage; or procuration of marriage; or a recommendation to an unvendible office; Bro. C. C. 114; see post. tit. "Office, Sale of;" or a wager concerning a branch of the public revenue; 2 B. & P. 130; 2 T. R. 610; or any stipulation painful to the feelings of others; Cowp. 729; or in general restraint of trade; post. tit. "Bond and Contract;" 3 T. R. 551; post. tit. Wager; or given for the signing of a bankrupts certificate; ante, vol. iii. p. 883; or withdrawing a petition against it; or joining in the acceptance of an illegal composition; id.; or given to a commissioner who is also a creditor, ante, vol. iii. p. 664; But if a creditor of a trader agree to sue out a commission of bankrupt against him, on receiving from a friend of the trader a composition for his debt, such contract is a good consideration for a bill; ante, vol. iii. p. 878. A bill given to the parish officer as an indemnity against the future expense of a bastard child is void; ante, p. 192. but a note given for an apprentice fee, though the term be for a less period than seven years, is valid; Grant v. Welshman, ante, p. 329. So when a creditor has acceded to a deed of composition, it is not illegal to obtain a bill or note from a third person as security; 6 T. R. 146; even although it may accelerate the payment of his portion of the composition, provided it be not obtained by a private stipulation in fraud of the other creditors; 4 East. 372; for if there be a secret arrangement for more than the composition money from a third person, and the third person pay the money, he cannot recover upon any bill or note, the debtor may give him for re-imburement; 1 Stark. 329; though the creditor may have been induced originally to trust the debtor upon a representation by such third person of his responsibility, and refused to consent to the composition, without such additional security; see these cases abridged, post. tit. Composition with Creditors.

† The rules as to the right of objecting, to the legality of the considerations, on account of its contravening some statutory enactment, are the same as those declared to be illegal at common law, unless the statute expressly declares that the bill, &c. shall be invalid in the hands even of a *bona fide* holder; 1 Stark. 385; 2 Esp. 538.

thing, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game, or by betting on the sides of such as game, or for re-paying any money knowingly lent for such gaming, or lent at the time and place of such play to any person that shall play or bet, shall be void to all intents and purposes.

2. ROBINSON V. BLAND. M. T. 1760. K. B. 2 Burr. 1077.

Therefore a bill or note given for money lost at play and money lent at the time and place of play, is void.

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A declaration in an action of *assumpsit* contained three counts: the first was upon a bill of exchange drawn at Paris, by Sir J. B., on himself in England, for the sums of 672*l.* sterling, payable to the order of the plaintiff 10 days after sight, and accepted by the said Sir J. B. The second count was for 700*l.* monies lent and advanced. The third count was for monies had and received, and the plaintiff's damage was laid at 800*l.* At the trial a verdict was found for the plaintiff, and 672*l.* given for damages, subject to the opinion of the Court on the following case. The bill of exchange was given at Paris, for 300*l.* there lent by the plaintiff to Sir J. B. at the time and place of play; and for 372*l.* more lost at the same time and place by Sir J. B. to the plaintiff at play. The play was fair, and there was not the least imputation on the plaintiff. The question was, whether, under these circumstances, the plaintiff was entitled to recover. *Per Cur.* The defendant has objected, that the consideration of the bill of exchange is wholly money won and lent at play; therefore, by force of the writing, the plaintiff cannot, by the law of England, recover upon it, such security being utterly void. The bill of exchange is, as a security void (being for a gaming debt) both in France and England; we may therefore lay the bill of exchange out of the case. It is perfectly clear the plaintiff cannot recover on that count. As to the second question, the other counts for money had and received to the plaintiff's use, and for money lent and advanced to him, we think it incontrovertibly evident that neither for the money won at play or the money lent can an action be sustained.

3. HENDERSON V. BENSON. T. T. 1820. Ex. 8 Price. 281. S. P. BOYER V. BAMPTON. T. T. 1748. K. B. 7 Mod. 334; S. C. 2 Stra. 1155.

As against the acceptor, even in the hands of a *bona fide* holder.

This was an action by the holder against the acceptor of a bill: the jury found for the defendant, on the ground that it arose out of a gaming transaction. A rule being obtained to show cause why the verdict should not be set aside, as the debt accruing on the bill to the plaintiff was *bona fide*, and for a valuable consideration, it appeared that the bill was drawn by a person who was an entire stranger to the acceptor, and to the person for whose benefit it was afterwards accepted. It was made payable to the drawer, and was, after being generally indorsed by him, delivered over, before acceptance, to the person who prevailed on him to draw it, and by that person given to the party for whose benefit it was ultimately accepted. It was afterwards accepted by the drawee, and delivered by him to a person to whom the acceptor had lent money at play, and for that consideration. It then got into the hands of other persons, who were partners in trade, and was by them indorsed and paid over to the plaintiffs for a valuable consideration, without notice. The Court held it to be within the statute of 9 Anne, c. 14. s. 1. on the ground of the acceptance being the act which gave to the bill its efficacy as a negotiable instrument, and completes it as a perfect instrument; and that the statute includes acceptances of bills drawn without any consideration, although the words are *given, granted, drawn, or entered into*; therefore the plaintiffs were not entitled to recover against the defendant.—Rule discharged. See Wilmot's Notes, 194.

4. EDWARDS V. DICK. H. T. 1821. K. B. 4 B. & A. 212.

But where a bill has been indorsed for a valuable consideration to a

Action on a bill drawn by the defendant on A. B., payable to defendant's order, and indorsed by him to plaintiff. Defence, that the defendant drew the bill for money won by him of A. B. at play. *Bayly, J.* thought this no defence, because, by indorsing the bill, defendant affirmed it to be free from exception, with which this defence was inconsistent, and rejected the evidence.—Verdict for plaintiff. On motion to enter a nonsuit, the Court said, We must refuse the rule. The first section of the 9th of Anne, c. 14. enacts,

"that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever won by gaming, &c., shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever." Now the words and indorsement of this statute are very strong; but if we understand the language of the legislature, with reference to the object which they had in view, viz. the prevention of gambling, we shall find that the policy of the statute of Anne was to prevent any security given for the payment of a gaming debt being enforced against the loser; and therefore neither the drawer, nor any person claiming under him, can maintain such an action as the present against the acceptor. The case of *Bowyer v. Bampton* (2 Stra. 115.) falls within this rule. The cases on the Statute of Usury follow the same principle; for although the case of *Ackland v. Pearce* (2 Campb. 599.) has been cited as an instance in which it was held, that a bill of exchange is void in the hands of a *bona fide* indorsee, if drawn in consequence of an usurious agreement for discounting it, although the drawer, to whose order it was payable, was not privy to such agreement; yet the principle upon which we intend to refuse the rule is supported by that decision. Let us look to the facts of that case, and our construction of them. The acceptor, who wanted to borrow money, applied to the drawee, who drew a bill for 386*l.* which was passed away by the acceptor for an usurious consideration, and afterwards fell into the hands of a third person, by whom the action was brought against the drawer; but in that case, substantially, the drawer and acceptor were the same persons, and the plaintiff claimed in effect, though not in form, *through the persons affected by the usurious contract*. But the rule of law goes no further, it being the established practice not to construe the words of a statute so as to extend them beyond the mischief contemplated by the act, where such construction would be injurious to the interests of third persons, which would be the case here, if we were to hold this to be a good defence, because we should be enabling the defendant to keep in his pocket the money won at play, and be thereby, in direct violation of the policy of the act, doing an injustice to an innocent party, and protecting an individual whom it was the intention of the legislature to prevent from obtaining money by means of gaming. Here being, therefore, no decided case with reference to bills tainted, as between the plaintiff and defendant, with illegality, either with respect to gaming or usury, militating against our present view of the case, and resting our decision, moreover, on the reasons we have already given, we must declare the acceptance void; but hold that the defendant, against whom a verdict was given at the trial, must be responsible for the amount of the bill.—Rule refused.

2. *By usury.* See *ante*, vol. iii. p. 380; and *post*, tit. "*Usury.*"

1. By the 12 Anne, stat. 2. c. 16. it is enacted, that no person or persons whatsoever, upon any contract, take, directly, or indirectly, for loan of any moneys, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or a lesser sum, or for a longer or shorter time; and that all contracts and assurances whatsoever, made after the time aforesaid, for the payment of any principal or money to be lent or covenanted to be performed upon, or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred aforesaid, shall be utterly void.

2. *HARRISON v. HANNEL*. M. T. 1814. C. P. 5 Taunt. 780; S. C. 1 Marsh. 349. Hence, usury in part of the con

* As to the particular species of game that are within the statute, see *post*. tit. Games, Gaming. A horse race for a plate under 50*l.* is illegal; see 2 B. & P. 51. Peake. N. P. C. 127; 13 Geo. 2. c. 19; 18 Geo. 2. c. 34; but a deposit of 25*l.* a-side is valid. See 4 Burr. 2432; betting on a game at cricket; 1 Wills. 220; or a foot race against time, are respectively illegal, and would vitiate a bill or note given by the loser in payment.

† Whether it be by a private stipulation between the original parties, or it appear upon the face of the bill, see 3 T. R. 424; 1 Doug. 235.

sideration of a bill renders the whole in valid.

the plaintiff had advanced different sums of money to the defendant's son at usurious interest, and the latter being indebted to the plaintiff on those transactions, and also for goods sold to the amount of 300*l.*, applied to the plaintiff to advance him the further sum of 150*l.*, which the plaintiff consented to do, without advancing more than the usual rate of interest, on condition that he would get his father to give his acceptance for the amount, and also to guarantee 100*l.* of the debt then due from the son to the plaintiff. The father accordingly drew one bill for 50*l.*, and two others for 100*l.* each. In an action on one of those bills, Gibbs, C. J. was of opinion, that as the defendant's acceptance had been deposited as a security for the whole transaction, legal as well as illegal, no specific appropriation having been made of any part, the whole contract was vitiated, and the plaintiff was entitled to recover no part of it; however, the plaintiff had a verdict, subject to the opinion of the Court. On motion to enter a nonsuit, the Court entertained the same opinion as Gibbs, C. J., and made the rule absolute.

3. BERKLEY v. WALMSLEY. E. T. 1803. K. B. N. P. 5 Esp. 11; S. C. 4 East. 55.

But if the acceptor of a bill, on discounting his own acceptance, takes more [339] than legal interest, it is not usury, though an improper practice.

Debt on the 12th Anne. It appeared that a bill of exchange had been sent to the defendant for acceptance, and upon being applied to for the bill, he said, *as the bill had some time to run, if you will let me deduct discount, I will let you have the money now.* The proposition being accepted, the money was sent for. The legal interest was only 1*s.* 6*d.*, but the defendant said he must have 6*d.* in the pound for giving the money, which was accordingly deducted. On the question whether this was usury, Lord Ellenborough, C. J. held it was not usury, inasmuch as there was no loan or agreement for forbearance, which was necessary in order to constitute usury. The plaintiff had a verdict; and on motion to set it aside, the Court refused the rule.

4. REX v. RIDGE. E. T. 1817. Ex. 4 Price. 50.

And a bona fide sale of a bill for less than its amount is not usury; though if a principal draw bills, and through an agent procure money to be raised upon them at an usurious discount, it is usury, for, being for the benefit of the drawer, and not of the agent, it can not be deemed a sale of the bill.

On a rule to show cause why a verdict should not be entered for the defendant, or a new trial granted, it appeared that a little before Lord Moira's departure for India, his lordship had drawn four bills of 1000*l.* each, payable to his own order 12 months after date, which were accepted by Ridge, his lordship's regimental agent. That they were then handed over, indorsed by Lord Moira generally, to Major James his lordship's confidential friend, and who had been employed in obtaining money for his lordship, through the medium of such bills, ever since the year 1802, by getting them discounted for that purpose, and often at the house of Austen and Maunde, but more particularly with Austen, who usually furnished cash for them. That Major James (having previously had a communication with Maunde on the subject of getting the bills negotiated,) took them himself to the banking-house of Austen, Maunde, and Co., where, after several interviews with Maunde, (without seeing Austen on the business,) he at length received from Maunde 3,600*l.* for the four bills, which he immediately gave to Lord Moira. Major James was known to Austen and Co. to be the agent of Lord Moira, and to be procuring the money for him. It was also in evidence, that Lord Moira's bills, so drawn and accepted, had become much depreciated in the market, which was explained to mean that they were not negotiable for so much in value as they purported to be drawn for, and that 15*l.* per cent. per annum was commonly required and received for discounting them. Major James had himself no interest in the bills, but was merely the agent of Lord Moira, and had not indorsed them, nor were there any other indorsement on them but that of Lord Moira. On that evidence the defendant objected, that the transaction was usurious; for that it was quite clear that the money given for the bills in question was in the way of discounting them for Lord Moira, and not as buying them of Major James. It was left to a jury to say, whether the transaction before them was merely colourable on the part of the house of Austen and Maunde, and was a discounting of the bills; or whether it was a fair and bona fide purchase of the bills by them. If the former, the judge directed them to find for the defendant; if the latter, for the crown; when the jury found a verdict for the crown. On a rule to set it asside.

Per Cur. The question was not one of fact. If Major James had received these bills from Lord Moira on his own account, as security for a debt, and had then sold them, the direction would have been right; but James was Lord Moira's confidential agent. (Adverting to the evidence.) This, therefore, [340] being clearly a loan to Lord Moira, and not a purchase in the market, it was not a question for the jury; and the judge should have told them that it was a transaction which the law did not allow. The bills getting into the hands of the crown under this extent against its debtor, does not remove the usurious quality.—Rule absolute.

5 WELLS V. GIRLING. M. T. 1819. C. P. 4 Moore. 78; S. C. 1 B. & B. 447; S. C. (not S. P.) 8 Taunt. 737. S. C. 3 Moore. 79.

The declaration stated, that the defendant made a promissory note payable by four instalments, and promised, that provided any one of the said instalments should happen not to be paid at the time appointed, he would pay the whole sum for which the note was given, or such sum as should then remain unpaid. The facts proved were, that the plaintiff being creditor of one A. B. for 80*l.*, proposed to the latter that if he would procure him security for his said debt, with interest, he would obtain the consent of his, A. B.'s other creditors, to accept a certain composition for their debts; whereon the defendant joined A. B. in the above note, for the sum of 87*l.* 3*s.*, being the amount of the debt with interest, as agreed. The plaintiff did not prevail with A. B.'s creditors to accept the composition mentioned, but sued out a commission of bankruptcy against A. B., under which he proved his debt on the note, and the bankrupt obtained his certificate. It was contended for the defendant, that usury was incurred by the terms of this note; for if the first instalment had not been paid, the interest on the whole sum would have been paid before it became due. But the Court held, that the stipulation was in the nature of a penalty for default, and was not an unusual condition in cases of this nature.

6. CHAPMAN V. BLACK. E. T. 1819. K. B. 2 B. & A. 583.

A. B. got money from C. D. upon usurious interest, and indorsed to C. D. a bill for 40*l.* upon the transaction. This bill, which was drawn prior to the 58 Geo. 3., came into plaintiff's hands *bona fide*, and for valuable consideration, but when it became due it was not paid, and plaintiff was apprised of the usury. It was then agreed that C. D. should draw for the amount upon defendant, and that defendant should accept for the accommodation of A. B., which was done accordingly.—Nonsuit. On rule nisi to set aside the nonsuit, and cause shown, the Court thought, that as defendant really stood in the place of A. B. whatever would be a defence for A. B. was also a defence for defendant; and as plaintiff's recovery in this action would enable C. D. to keep the usurious interest he had received, and plaintiff, by taking this new security, in which A. B.'s name was studiously omitted, was binding himself to screen C. D.; that the usury was a bar to this action, and the rule for setting aside the nonsuit must be discharged. See 1 Stark. 385; 2 Taunt. 184; 1 Esp. 274, 1 East. 92; 3 T. R. 538; 8 id. 390.

7. PRATT V. WILLEY. M. T. 1794. K. B. N. P. 1 Esp. 40.

Action by indorsee against maker of a note. Plea, usury. It appeared that the defendant had, in discounting the note, given in part a diamond ring, for which he had charged much beyond its value. *Per Lord Kenyon*, C. J. If in discounting a bill the party gives goods in part, and those are goods of

• Where a new security is taken in lieu of another, void in respect of usury, &c. it will be invalid in the hands of the party to the first illegal transaction, but not if in the hands of a *bona fide* holder, even if the transaction has taken place anterior to the 28 Geo. 3; see 8 T. R. 390; 3 Esp. 210; 4 Esp. 264; 2 Taunt. 184; 1 Campb. 187. And a security given by the borrower to a person not privy to the usurious transaction and to whom the lender is indebted in so much money, is not avoided by the usury; as where W. was indebted to A. in 100*l.* for the forbearance of which he agreed to pay more than legal interest, and A. being indebted to E. in 100*l.*, W. & A. joined in a bond to E. in payment of his debt, it was held not to be usurious; see Cro Jac. 32; Moore 752; And though it has been held otherwise at Nisi Prius, it has recently been decided, that after usurious securities for a loan have been destroyed by mutual consent, and there is a fresh contract

an adequate value, and are estimated at that value, that is not usury; but if the party so discounting the bill makes the holder of it take them at an higher price than their intrinsic worth, it is usury.

8. DAVIS v. HARDACRE. H. T. 1810. K. B. N. P. 2 Campb. 375.

And in such a case it lies upon the plaintiff to prove the value of the goods.

Action on a bill of exchange. It appeared that the defendant being much pressed for money, applied to the plaintiff to discount the bill in question, which the plaintiff refused to do, unless the former would take a picture at 150*l*. The defendant offered to prove that the plaintiff had bought the picture for 32*l*. which was its real intrinsic worth.

Per Lord Ellenborough, C. J. It lies upon the plaintiff to prove the value of the picture. When a party is compelled to take goods in discounting a bill, the presumption is that the transaction is usurious; to rebut which evidence should be given of the value of the goods by the person who sues on the bill.—Plaintiff nonsuited.

9. LOWE v. WALLER. T. T. 1781. K. B. 2 Doug. 735. S. P. LOWES v. MAZZAREDO. T. T. 1816. N. P. 1 Stark. 385.

Before the 58 Geo. 3. a bill given upon an usurious consideration was void, even in the hands of a bona fide holder, without notice of the usury.

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This was an action on a bill of exchange, tried before *Lord Mansfield*, at Cuildhall, at the sittings after Hilary term 1781. The plaintiffs declared as indorsees of Harris and Stratton, to whom the bill was stated to have been indorsed by Lawton, the drawer and payee. The defendant was the acceptor. The defence was, that the bill was given upon an usurious contract between Harris and Stratton and the defendant. This was controverted by the plaintiffs; but they also insisted that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury; and it was argued, that although it should appear that the original transaction was usurious, still the defendant was answerable to them. Upon the evidence, the case was this; Waller, a commissioner of the stamp duties, had employed one Lemon, a money-broker, to raise the sum of 200*l*. upon the bill in question. Harris and Stratton, hearing of this, sent their broker to Lemon, to inquire whether Waller wanted money, and he told the broker he believed he did, for, to his knowledge, he had a bill to pay in a few days. The broker said, his principal would advance 100*l*. in money, and 100*l*. in goods, but that the goods should be choice sorts, and he should not lose by them; that he should have them at the warehouse price. Lemon upon this went and informed Waller, that Harris and Stratton's broker had been with him; and Waller asking him how they would deal, he told him what had passed, and that the broker had appointed him to go with Waller to Harris and Stratton's warehouse the next day. Waller, agreeably to this appointment, went along with Lemon the next day, and found Harris and Stratton at their warehouse, who made an apology to Waller for not having any money at that time, but only goods, and desired the business might be let alone for a few days. Lemon called several times after this to get a day fixed, and told them, as he had mentioned before to their broker, that Waller wanted money in order to pay several demands. In the course of about three weeks, Harris and Stratton said to him, that if Waller would come the next day they would give him 50*l*. and he and Waller accordingly went the next day. When they came, one of the partners went out and returned in a little time, saying, he could not get any money, but if Waller would take the whole in goods, he should have them directly. Waller agreed; and the goods (hosiery ware) were sorted out by one Strutt, a broker, who was present, and delivered to Waller, and, at the same time Waller delivered to Harris and Stratton the bill of exchange, and also an assignment of his salary, as a collateral security in case the bill should not be paid when it should become due. Strutt and Lemon carried the goods to the shop of Elderton, an auctioneer, who was a stranger to Waller, and who was to sell them, or advance the value. He desired two hours to make his calculation; and at the end of by the borrower to repay the principal and legal interest, such fresh contract is valid; see 1 Campb. 187. So where a man had given bills for the amount of a gaming debt, and when they became due confessed judgment, the Court refused to set the judgment aside; see 4 Taunt. 683. So an usurious bill, though void in itself does not extinguish a legal subsisting debt; see 3 Camp. 119; post tit. usury.

that time, Lemon and Waller came to him, and he offered 120*l.* for the goods, saying, it was the utmost they were worth. Waller took the 120*l.* ; it being agreed, that if they should sell for more, the balance should be accounted for by Elderton, and if for less, that Waller should be answerable to him for the difference. Afterwards, Elderton delivered an account to Waller of the sale of goods at 117*l.* 2*s.* 2*d.* There was no evidence that the plaintiffs knew of the above transaction, or the circumstances under which the bill had been given. The question, whether the transaction was a loan of money for more than 5 per cent. under colour of a sale of goods, was left to the jury. If they should be of opinion that it was, it was agreed that a case should be reserved on the other point, being a mere matter of law. In summing up to the jury, Lord Mansfield told them, that the statute of usury, 12 Ann. st. 2. c. 16. was made to protect men who act with their eyes open ; to protect them against themselves. Upon this principle, it makes it penal for a man to take more than the fixed rate of interest, it being well known that a borrower in distress would agree to any terms. " No person shall take directly or indirectly. for the loan of money, &c. above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or less sum, or for a longer or shorter time." They were, therefore, to consider, whether the transaction between the defendant and Harris and Stratton, was not in truth a loan of money, and the sale of goods a mere contrivance and evasion. The most [343] usual form of usury was, his lordship said, a pretended sale of goods. He then stated the material parts of the evidence, and made some strong observations to show that it was not the intention of the parties to buy and sell, but to borrow and lend, and that the contract was, in truth, for a loan of money, though under the mask of a treaty for the sale of goods. The jury found the contract to be usurious ; but if, in point of law, the plaintiffs should be entitled to recover, they assessed the damages at 222*l.* 10*s.* being the amount of the bill with the interest due upon it. Upon this a case was made for the opinion of the Court, which, after setting forth the bill of exchange, bearing date the 27th of October, 1778, and payable in three months, with the indorsements, in blank, of Lawton and of Harris and Stratton, stated, " that the bill was given by Waller, the acceptor, to Harris and Stratton, upon an usurious contract, whereby more than legal interest was secured. That the plaintiffs took the bill from Harris and Stratton for a valuable consideration, and without notice of the usury." The defendant relied on the case of *Bowyer v. Bampton*, reported in 2 Strange. 1155. where upon the construction of the statute 9 Ann. c. 14. s. 1. a promissory note given for money knowingly lent to game with, is void in the hands of an indorsee for valuable consideration, and without notice ; for the words of that statute being, " that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, &c. shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," the Court held, that it would be making the note of some use to the lender, if he could pay his own debts with it ; and that the indorsee would not be without remedy, for he might sue the indorser on his indorsement. And it was insisted that the words of 12 Ann. st. 2. c. 16. though not exactly the same, are equally strong with those in the act against gaming ; for by 12 Ann. st. 2. c. 16. not only the security, or assurance, but the contract itself, is made void. *Per Cur.* We have considered this case very attentively, and with a great leaning and wish that the law should turn out to be in favor of the plaintiffs. But the words of the act are too strong. Besides, we cannot get over the case on the statute, against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience. It is less mischievous that the law should be as it is with respect to bills and notes, than other securities ; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill.—*Postea* to be delivered to the defendant.

10. *ACKLAND v. PEARCE*. H. T. 1811. N. P. 2 Campb. 599 ; S. C. cited and

And a bill of exchange drawn in consequence of an usurious agreement in the discounting of it, was held void in the hands of such holder, though the drawer was not privy to such agreement.

commented upon, ante, p. 337. *S. P. YOUNG AND ANOTHER v. WRIGHT. M. T. 1807. N. P. 1 Camp. 140.*

Assumpsit by the indorsee against the drawer of a bill of exchange. Defence usury. To establish this the acceptor was called, who stated that he, being much pressed for money, applied to one W. to get the bill discounted, which he refused to do, because it had too long to run, whereupon the acceptor said he would get it changed for one of a shorter date; W. said he would not ever then do it, except that he had 10*l.* which was more than the usual interest; it was contended that in the hands of a *bona fide* holder for a valuable consideration, the transaction could not be affected by the alledged usury, especially as the defendant was unacquainted with the agreement. The jury found a verdict for the plaintiff. But *Le Blanc, J.* said, the drawer's ignorance of the agreement, was immaterial. Had the bill been in existence before the agreement, the usurious contract with W. could not have vitiated it in the hands of the plaintiff; but as the agreement was the cause of the making of the bill, it was clearly void.

11. *PARR v. ELIASON. M. T. 1800. K. B. 1 East. 92; S. C. 3 Esp. N. P. C. 210. S. P. DANIEL v. CARTONY. 1 Esp. 274.*

But if a bill of exchange were good in its inception, usury in the intermediate indorsements would not have avoided it in the hands of a *bona fide* holder.

A bill was drawn in favour of the plaintiff. He indorsed it to A. and B. upon an usurious consideration, and they indorsed it over. It was afterwards indorsed back to the assignees of A. and B. who had become bankrupts for a debt due to their estate. Upon which plaintiff brought trover to recover back the bill. Lord Kenyon upon the trial directed a nonsuit; and after a rule nisi for a new trial, the Court held that as the bill was fair and legal in its first concoction, and as the indorsement by A. and B. was unimpeached, their indorsee had a good right to the bill, and that right was transferred to the defendants; and they observed, that where the bill itself in its original formation was given for an usurious consideration, the words of the statute of 12 Ann. st. 2. c. 16. were peremptory, that the assurance shall be void, and that the construction which had been put upon the statute had gone far enough in saying that it should be avoided even in the hands of an innocent indorsee without notice, but that no case had gone the length then contended for, nor did the words of the act require it.—Rule discharged. See 1 Sid. 133; 2 Burr. 674; Ca. Temp. Talb. 187; Doug. 736; 2 Vern. 159; 2 Str. 1155; 1 Saund. 294. and note; 8 T. R. 390.

And now by 58 G. 3. all bills or notes given for an usurious consideration are declared to be void in the hands of an innocent indorsee.

By 58 Geo. 3. c. 93. it is enacted, that no bill of exchange or promissory note that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract.

3. *Insurance in the Lottery.*

A note given for hits against the defendant in a lottery insurance, [345] may be enforced by an innocent indorsee.

WINSTANLEY v. BOWDEN. M. T. 1801. cited 1 Selw. N. P. 385. S. P. WYATT v. BULMER. H. T. 1797. 2 Esp. 538.

In an action by the indorsee against the maker of a promissory note; the defence insisted, on was, that the note had been given for hits against the defendant in a lottery insurance. But Kenyon, C. J. was of opinion that the plaintiff was entitled to recover, observing that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent indorsee be deprived of his remedy on the note, and that a contrary doctrine would shake paper credit to the foundation. See post, tit. "Lottery."

4. *Sale of Offices.*

A bill of exchange given on the sale of a public office or appointment is illegal. See 5 Ed. 6. c. 16; 8 T. R. 93; 1 H. Bl. 322; 2 Wils. 133; Com. Dig. Officer, K. 1. post, tit. "Offices, Sale of."

5. *Insurances.*

A bill of exchange arising out of a gaming policy on ships or lives is ille-

gal. See 19 Geo. 2. c. 37; Cowp. 583; 2 East. 385.

6. *For the price of Spirituous Liquors.*

1. SCOTT v. GILLMORE. M. T. 1810. C. P. 3 Taunt. 226. *Semb. contra*, SPENCER v. SMITH. E. T. 1811. N. P. 3 Camb. 9.

To an action against the acceptor of a bill of exchange, the defence offered was, that the bill was given for a debt incurred partly for small quantities of spirits, and spirits mixed with water, of a value under 20s. sold contrary to the stat. 24 Geo. 2. c. 40. s. 12.* For the plaintiff it was urged, that as part of the consideration of the bill was money advanced, and as the statute did not expressly render void securities for such debts, the bill was *pro tanto*, valid; but the Court were of opinion that as the statute declared all such transactions to be illegal, they could not distinguish the component parts of the consideration, but that the illegality must be deemed to affect the whole.—Rule refused.

2. GAITSKILL v. GREATHEAD. E. T. 1822. K. B. 1 D. & R. 359.

Pleas to a declaration upon a bill of exchange, with counts for goods sold.

1. That part of the consideration of the bill was spirituous liquors sold at different times in quantities less in value than 20s.; and 2. That the plaintiff and defendant had accounted together, and that the latter had given the former a bill of exchange for the amount of the goods mentioned in the common counts, which bill is still outstanding and unsatisfied. The Court held that these were issuable pleas, and could not be treated as nullities, so as to entitle the plaintiff to sign judgment as for want of a plea, and observed the Common Pleas have held (*ante*, 345.) that a bill of exchange, part of the consideration of which is spirituous liquors sold in less quantities than 20s. value, is totally void, though part of the consideration was money lent. See 3 Campb. 9; 1 Sid. N. P. 61; Peake. N. P. C. 180; 5 B. & A. 211.

7. *For Stock jobbing.*

1. STEERS v. LASHLEY. M. T. 1794. K. B. 6 T. R. 61.

At the trial of this action by the indorsee against the acceptor of a bill of exchange, it appeared that the defendant and one W. had been concerned in stock jobbing transactions, and that W. had paid certain differences for which the defendant had given the bill in question. On it being disclosed that the plaintiff had taken the bill, knowing that it had arisen from stock jobbing speculation, Lord Kenyon, C. J. was of opinion that the plaintiff could not recover, and directed a nonsuit. And on motion to set it aside on the authority of *Petrie v. Hanway*, 3 T. R. 413. as the bill in this case was not given to pay the difference, but to pay the broker the money which he had paid. *Per Cur.* This case is distinguishable from the decision cited as an authority; here the bill on which the action is brought was given for the differences; and therefore as W. could not enforce the payment, any person knowing the circumstances can be placed in no better situation than W. The rule must be discharged.

2. BROWN v. TURNER. E. T. 1798. K. B. 7 T. R. 630.

One P. paid some stock jobbing differences for the defendant, and drew on him for the amount; defendant accepted the bill; and after it became due, P. indorsed it to the plaintiff for a prior debt. On the question whether the illegality of the transaction vitiated the bill, the plaintiff having taken it after it became due, and consequently not being entitled to recover upon it if P. could not, Lord Kenyon, C. J. said, that it was clear that P. could not have enforced the payment, and directed a verdict for defendant. And on motion to set it aside, the Court held the direction right, and refused the rule.

8. *For an apprentice fee.*

GRANT v. WELCAMAN. M. T. 1812. K. B. 16 East. 207 abridged *ante*, vol. ii. p. 16.

It is no objection to an action on a promissory note that it was given as part of the consideration of an indenture of apprenticeship for less than seven

If the sale of goods in quantities under a certain value be declared illegal, a bill given on account of such quantities is void, though part of the consideration be unimpeachable.

Therefore if the consideration of a bill of exchange be "spirituous liquors sold at different times in quantities less in value than 20s." the instrument is void.

Where a third person having given value for a bill, knew at the time he became holder that it was originally founded on a stock-jobbing transaction;

Or where a person becomes holder of such bill after it becomes due, he cannot recover on it.

* It enacts that no person shall maintain any action for any debt or demand for any spirituous liquors, unless such debt has been *bona fide* contracted at one time to the amount of 20s. or upwards, nor shall any item in any account for distilled spirituous liquors

[347] years, by being antedated; such indenture being only voidable, nor does the consideration of the note fail, because the apprentice was discharged by a magistrate after two years, on account of the master having enticed him to commit felony, particularly when the apprentice fee was to be paid in the first instance, though in case of the defendant the note was taken for part of it payable at a distant day.

9. *Trading against the laws of the East India Company.*

A bill or note arising out of a trading against the laws of the East India Company, cannot be enforced; see 1 B. & P. 552. *post*, tit. East India Company.

10. *For Bribery.*

A bill or note given for a vote at an election is illegal; see 2 Geo. 2. c. 24; Lofft, 552; 3 Burr. 1235; 1 Blac. 380; 1 T. R. 56. *post*, tit. Bribery.

11. *For Simony.*

A bill or note arising out of a simoniacal contract is void; see 31 Eliz. c. 6; Jones. 341; Co. Lit. 206. b; Willes, 571. *post*, tit. Simony.

12. *For ease and favor to sheriff.*

A bill or note given to a sheriff for ease and favour is invalid; see 23 Hen. 6 c. 9; 1 T. R. 418; 2 T. R. 569; 1 Pow. 173.

13. *For the ransom of a ship captured.*

A bill or note given for the ransom of a ship captured cannot be enforced; see 22 Geo. 3. c. 25 s. 2.

14. *For signing a bankrupt's certificate.* See tit. Bankrupt, *ante*, vol. iii. p. 888.

VIII. RELATIVE TO THE ALTERATION OF A BILL OR NOTE. *

(A) WHEN VITIATED BY.

(a) *With reference to the time when made.* 1. *Before Acceptance.*

1. KENNERLY V. NASH, M. T. 1816. N. P. 1 Stark. 452.

A bill may be altered before acceptance if the parties consent.

Action by the indorsee of a bill of exchange against acceptor. It appeared the bill had been originally drawn payable three months after date, and afterwards by desire of drawee, and with consent of drawer, altered to four, and then accepted. On the question, whether it required a new stamp, Lord Ellenborough held that a new stamp was unnecessary.

2. WALTON V. HASTINGS. E. T. 1816. K. B. 2 Chit. Rep. 121; S. C. 4 Campb. 223; S. C. 1 Stark. 215.

But if they do not assent, a new stamp is necessary.

The plaintiff in an action against the acceptor of a bill was nonsuited, the instrument having been altered in the date by the son of the payee, at the suggestion and in the presence of the defendant, who afterwards accepted it. A motion was now made to set aside the nonsuit. *Per Cur.* It was a good bill previous to its alteration, and available at all events against the drawer; and if the parties change their intention, it makes a new bill, and should have a new stamp, particularly if done without the acquiescence of the parties.—Rule refused.

2. *After acceptance.*

1. JOHNSON V. GARNETT. H. T. 1815. K. B. 2 Chit. Rep. 122. S. P. JACOBS V. HART. H. T. 1817. K. B. N. P. 2 Stark. 45.

Bill altered in date after acceptance, but before it was put into indorsee's hands held good.

It was urged in this case that an alteration in the date of a bill of exchange, made under the following circumstances, had vitiated the instrument. A. drew a bill; B. accepted it; after which, when the parties were all together, and before it had been negotiated, it was agreed that the date should be altered from the 8th to the 28th. But the Court said that the whole was *in fieri*, and that as the alteration took place whilst the parties were all together, and the bill not completed, it was immaterial.

2. DOWNES V. RICHARDSON. E. T. 1822. K. B. 5 B. & A. 674; S. C. 1 D. & R. 332.

be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least without fraud, and where no part of the liquors sold or delivered shall have been returned, or agreed to be returned, directly or indirectly.

* The general rule is that an alteration of a bill or note in any material part, (though by consent of all parties) after it is once issued, violates the securities, unless it be made to correct a mistake and render the instrument what it was originally intended to be.

Upon an issue from Chancery, on a question, whether the defendant, as acceptor of a bill of exchange, was indebted thereon to the plaintiff, an indorsee, it appeared in evidence that the bill was drawn by A. B., to his own order, upon the defendant, accepted by defendant, and indorsed by A. B.; that its date was the 6th of March; that A. B. and defendant were in the habit of putting their names for each other upon bills, and that defendant put his name upon this bill to enable A. B. to pass it. A. B. put it into the hands of an agent, who could not pass it till the 10th of April, when he paid it for value to C. D., who passed it for value to plaintiff. Before it was paid to C. D., the date was altered to the 16th of March. Defendant did not know of this alteration till after the bill was paid to C. D., but as soon as he knew of it he assented to it. It was urged for defendant that this alteration made a new stamp necessary; but upon a case reserved, the Court thought otherwise; for though the bill had names upon it, so as to give it the semblance of an available bill before it was paid to C. D., it was not, in fact, an available bill till that payment; no person could have made a claim upon it, and if not, it was not to be considered as issued till that period, and then the alteration was in time; and though defendant would not have been bound by the bill in its altered state, had he not assented to the alteration, but might have insisted that the alteration cancelled his acceptance, his subsequent assent bound him, and revived and continued his acceptance. See 3 Campb. 343; 4 id. 223; 2 Stark. 313; 5 T. R. 537; 9 East. 190; 15 id. 412.

So an accommodation bill altered in its date before negotiation with the consent of the acceptor, is as against him a valid instrument.

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And it has been held on that such alteration would not discharge under similar circumstances the acceptor, even where he has not assented to the alteration.

3. JOHNSON v. GIBB. E. T. 1815. K. B. 2 Chit. Rep. 123.

This was an action by the payee of an accommodation bill. It appeared that after it had been accepted, but prior to its negotiation, its date had been altered by the drawer, with the consent of the plaintiff but without the actual assent of the acceptor. Plaintiff was nonsuited. These facts now came before the court on a motion for a new trial, when Lord Ellenborough, C. J. said I left it to the jury to find for defendant, unless they thought that there was a general authority from the acceptor to the drawer to draw upon him, and that the acceptor would accept any bill.—Rule absolute on payment of costs.

4. JOHNSON v. GIBB. E. T. K. B. 2 Chit. 123.

Motion for a new trial on an action brought by indorsee against acceptor of a bill. The plaintiff had been nonsuited, it appearing that the bill had been altered after acceptance, which alteration made it payable 20 days later, with the consent of the plaintiff, the payee, but without the actual assent of the acceptor. The facts had been left to the jury, to say whether there was a general authority from the defendant to the drawer to draw upon him, and that the defendant would accept any bill, in which case they were to find for the plaintiff, but otherwise for defendant. A rule nisi was granted, which was afterwards made absolute.

Though a bill, not an accommodation one, altered in its date by drawer after acceptance, with consent of the payee, but not of the acceptor, is a nullity.

3. After delivery.

1. CARDWELL v. MARTIN. H. T. 1808. K. B. 9 East. 190; S. C. 1 Campb. 79.

On the 3d of June, 1807, the defendant and Giles and Co. exchanged acceptances; on the 23d, before either of the bills had been passed away, they altered the dates to the 23d; the bills were payable at a certain period after date. Lord Ellenborough thought a new stamp necessary, and nonsuited the plaintiff, with liberty to move to set aside the verdict. On motion accordingly, the whole Court thought that the alteration rendered a new stamp necessary, observing that the delivery of a bill by the drawer to the acceptor, and the redelivery of it for a valuable consideration, such as the exchange of acceptances, had been holden to be, since Cowley v. Dunlop. 7. T. R. 568. a negotiation of the bill; that the several drawers in the case were mutual purchasers of each other's acceptances; and that as the alteration was made while the bill was in this state of negotiation, and after it had continued so 20 days, (during which time it was in the power of the drawer and the payee to have passed to any third person,) it was, in effect, moving a new bill.—Rule refused. See 1 East. 92; Doug. 736.

If two persons exchange acceptances, each bill is to be considered as issued, and any alteration afterwards will make a new stamp requisite.

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Therefore inserting words in a bill or note, originally expressed to be for value received generally stating such value to have been received on a particular account;

2. KNILL v. WILLIAMS. H. T. 1809. K. B. 10 East. 431.

This was an action on a note, by which, nine months after date, the defendant promised to pay to the plaintiff, or order, 100*l.* for value received, *for the good will of the lease and trade of A. B. deceased.* It appeared at the trial before Le Blanc, J. that the words in italics were added by consent of both parties on the day after the note had been signed and delivered to the plaintiff without any new stamp being impressed upon it. Upon this the plaintiff was nonsuited; and on a rule nisi to set aside the nonsuit, the court held, as the alteration was material, as well because it was evidence of a fact which, if necessary to be inquired into, must have otherwise been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder upon inquiry, whether that consideration had passed, and as such alteration was made after the note had issued, a new stamp was necessary.—Rule discharged. See 4 T. R. 320; 5 id. 367. 537; 2 H. Bl. 141; 9 East. 190; 1 Camp. 79; 3 Esp. 246.

3. BATHE v. TAYLOR. E. T. 1812. K. B. 15 East. 412.

Or postponing the day of payment;

The question in this case was, whether a bill of exchange, drawn on the 1st of August, at two months, by A. B. payable to the order of the drawer, and accepted and re-delivered by B., as a security for a debt, and kept by A. for 20 days, could not be altered in its legal effect by bringing forward the date to the 21st, without a new stamp, with the consent of the acceptor, and before indorsement and delivery to a third person. *Per Cur.* The utmost extent of the principle established by the cases of Kersham v. Cox. (post, 351,) and Cole v. Parkin (12 East. 471,) which have been cited, is, that where an instrument on stamped paper has at first been drawn by mistake in a form not according with the intention of the parties, it may be corrected without a new stamp; but if the parties have altered their original intention, and make a new instrument different from that which they originally contemplated, then a new stamp is necessary. This is the principle impressed in all the cases, and particularly also in Masters v. Miller (4 T. R. 320.) Now here there was no correction of a mistake, for it was originally intended to be a bill at two months from the 1st of August, and the defendant accepted it as such; that there was in issuing of the bill. A new stamp was consequently necessary. See 8 East. 373; 9 id. 190; 10 id. 431; 1 Campb. 79; 4 T. R. 320; 5 id. 527.

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Without the drawer's consent;

4. OUTHWAITE AND ANOTHER v. LUNTLEY. E. T. 1815. N. P. 4 Campb. 179. S. P. WALTON v. HASTINGS. T. T. 1815. N. P. 4 Camp. 223; S. C. 1 Stark. 215.

Action by the indorsees against the indorser of a bill of exchange. It appeared the date of the bill, when left for acceptance by the drawees before acceptance, had been altered, but after indorsement, and without the drawer's consent, which defendant's counsel contended vitiated the bill; and Lord Ellenborough said the bill was at that time a perfect instrument, on which the drawer might have been sued before acceptance; and in that case consent even would not justify the alteration, because after a bill had been once negotiated, any material alteration renders a new stamp necessary.—Plaintiff nonsuited.

As by converting nine months into ten, makes a new stamp necessary.

5. WILSON v. JUSTICE. 1796. Cited Bayley on Bills. 89. 4th edit.

This was a bill payable nine months after date, and having, with the consent of all parties, a fortnight after delivery, been altered to ten months. Lord Kenyon, C. J. held a new stamp indispensable.

6. KERSHAW v. COX. M. T. 1800. N. P. 3 Esp. 246.

But where a bill was originally intended by the parties to be negotiable, it was holden

Indorser against payee of a bill of exchange. Defence, that it having been altered it required a new stamp. Proof, that defendant had indorsed it to A. B., who had indorsed it to the plaintiff; who, on discovering that the words, *or order*, were wanting, sent it back, and the drawer, with the defendant's consent, inserted the words, *or order.* Le Blanc, J. was of opinion, that as the alteration was merely a correction of a mistake, and in furtherance of the original intention of the parties, it did not require a new stamp. The insertion of the words "*or order*," did not affect the stamp.

4. *After date.*

BOWMAN v. NICHOL. H. T. 1794. K. B. 5 T. R. 537; S. C. 1 Esp. 81.

A bill drawn payable so many days after sight, is accepted, and then by mutual consent of drawer and acceptor, altered twice; the first time, by increasing the days of payment; the second, by restoring the bill to its original form, and bringing forward the date; both alterations were made before the bill was transferred by the drawer; but the second was made after the bill had become due as it originally stood; after which it was negotiated; and on action brought against the acceptor, Lord Kenyon, C. J. said, that every alteration in an instrument requiring a new stamp, made a new stamp necessary, and nonsuited the plaintiff. Upon a rule nisi for a new trial, the Court held, that as when the last alteration was made, the bill, according to its original tenor, was spent; that alteration was the drawing of a new bill, and rendered a new stamp essential, and affirmed the nonsuit.

Every alteration of a bill, after the time it comes due, is deemed a fresh drawing, and therefore requires a new stamp.

(b) *With reference to the nature of the alteration.* 1. *As to the names of the parties.*

CLERK v. BLACKSTOCK. Car. Ass. 1816. K. B. N. P. Holt. 474.

A note was made in these words, *I promise to pay plaintiff, or order, l., value received.* Thomas Jackson, John Blackstock. In an action against Blackstock, it appeared that Blackstock's name was added to it as a surety. It was objected that there should have been an additional stamp for Blackstock's signature; but Bayley, J. ruled that the necessity of the additional stamp depended upon whether Blackstock's signature was part of the original bargain before plaintiff took the note, or an after-thought; and it appearing to have been part of the original bargain, the plaintiff had a verdict.

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After a note has been made by one, the name of another can not be added thereto as surety, unless by indorsement.

2. *As to the time.*

1. MASTER v. MILLER. T. T. 1791. K. B. 4 T. R. 320. affirmed 2 H. Bl. 141; S. C. 1 Ambr. 225. S. P. CALVERT v. ROBERTS. H. T. 1813. K. B. N. P. 3 Campb. 343.

A bill of exchange was drawn on defendant on the 26th of March, 1788, three months after date, to J. S., and accepted by defendant; after acceptance, and while the bill remained in the hands of J. S., the payee, the date of the bill was altered by some person unknown, from the 26th of March, 1788, to the 20th of March, 1788, without the authority or privity of the defendant. J. S., the payee, afterwards indorsed the bill, so altered, to the plaintiffs for a valuable consideration. It did not appear that plaintiffs knew of the alteration at the time when the bill was indorsed to them. Payment having been refused, plaintiffs sued the acceptor. The declaration contained two special counts: one on a bill dated 20th of March, 1788; the other on a bill dated the 26th of March, 1788, and the money counts. After argument, on a special verdict, the question was, whether *this action could be maintained by these parties on this instrument*; when Lord Kenyon, C. J., and Ashurst and Grose, Js., (Buller, J. dissent.) said, we do not mean to examine or consider all the cases where the alteration has been made by accident, for here it is stated that this alteration was made while the bill was in the possession of the payee, who was then entitled to the amount of it, and from whom plaintiffs derive title; and it was for the advantage of the payee to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time, for at that time almost all written engagements were by deed only; therefore, those decisions which were indeed confined to deeds, applied to the then state of affairs; but they established this principle, that all written instruments, which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It was doubted in Ward's case, 2 Stra. 747; S. C. 2 Lord Raym. 1461; whether forgery could be committed in any instrument less than a deed, or other instrument of like authentic nature; and it might equally have been decided there, that as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there

An alteration of the time of payment in a bill of exchange renders it unavailable, even in the hands of a bona fide holder for a valuable consideration, and though it be made by a mere stranger.

holden, that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. From Pigot's case, 11 Rep. 27. which is the leading authority, we collect, 1st, that when a deed is erased, whereby it becomes void, the obliger may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded it was not his deed; and 2d, that when a deed is altered in a material point by himself, or even by a stranger, without the privity of obligee, the deed thereby becomes void. Now, the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. In reading that and the other cases cited, we observe that it is no where said that the deed is void merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal; and the principle of these cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle too appears to us as applicable to one kind of instruments as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds. But we think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100*l.*, and after acceptance the same was altered to 1000*l.*, it is not pretended that the acceptor shall be liable to pay the 1000*l.*; and we say he cannot be compelled to pay the 100*l.* according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill; and the alteration in every respect prevents the instrument continuing the same, as well when applied to a bill as to a deed. It has been also urged, that no fraud was intended in this case, at least that none is found. But we think, that if it had been done by accident, that should have been found to excuse the party, as in one of the cases where the seal of a deed was torn off by an infant. On the whole, we are of opinion that this falsification of the instrument has avoided it. And we do not think that the plaintiffs can recover on the general counts, because it is not stated as a fact in the verdict, that the defendant received the money, the value of the bill; though we do not mean to say there is no mode of framing an action so as to give the plaintiffs some remedy. Consequently our judgment must be for the defendant. See T. R. 151; 11 Co. 27; Doug. 633; 3 Burr. 1354; 1 Burr. 452; Doug. 514; 1 H. Bl. 569; 2 Stra. 747; 2 Ld. Raym. 1461; 2 Blac. Rep. 1272.

PATON V. WINTER AND ANOTHER. H. T. 1809. C. P. 1 Taunt. 420

It appeared in an action on the case for altering a bill, and rendering it invalid, that A. having drawn on the defendants a bill of exchange, payable to his own order one month after date, indorsed it to B., by whom it was indorsed to the plaintiff, who presented it for acceptance to the defendants; but that they altered the period of payment mentioned in the bill, by erasing the words "one month," and inserting in their place the words "two months;" but it did not appear that the plaintiff had any knowledge of the alteration. On the bill becoming due as altered, it was presented by the plaintiff's bankers, with whom he had lodged it, to the defendant's; and it being refused payment, application, was made to A. & B., who refused to pay on the ground of unauthorised alteration. On this the plaintiff brought the present action, and obtained a verdict. On a rule nisi, to enter a nonsuit, the defendant's counsel contended that admitting the circumstances stated, to have discharged A. & B., the plaintiff was, if damaged at all, injured by his own default; as by keeping the bill till the expiration of two months, he had concurred in the new engagement entered into by the new acceptor. The Court acquiesced in this argument, and the rule was made absolute.

3. JOHNSON V. THE DUKE OF MARLBOROUGH. H. T. 1818. K. B. N. P. 2 Stark, 313.

But if any party acquiesces in such alteration, the bill is valid as between such assenting party and the acceptor. And where the alteration extended the time of payment and the holder, whose ignorance of the alteration was not shown, presented the bill at such extended period, the Court held it an acquiescence on his part. Qu. if he did not know of the alteration?

Action by indorsee against acceptor on a bill payable to the drawer's And in such order. The bill, on production, appeared to have been dated originally case, in ac 29th of December, but the date was altered to 29th of January. The altera tion by in dorsement which was immediately above the acceptance, was proved to be in defend- against ac ceptor, it ant's hand-writing. *Abbott, J.* intimated that he must have proof that the alte- lies on the stamp would have been necessary, the plaintiff was bound to prove such plaintiff to fact. show that the altera tion was made pre

3. *As to the place of payment.*

1. *TIDMARSH V. GROVER.* T. T. 1813. K. B. 1 M. & S. 735.

Defendant's accepted a bill of exchange, so as to make it payable at B. & vious to the Co's. B. & Co. failed; and the drawer, without defendant's knowledge or indorse ment of the to the plaintiff. On a point reserved, whether this alteration vacated the ac- note by the ceptance, the whole Court held it did, and a nonsuit was directed. They ob- drawer. served if the alteration led to no other consequence than this, that the holder Altering an might have protested the bill for non-payment at a place where the acceptor acceptance had never made it payable, and thereby put the party to an additional ex- by insert pense; that would be a sufficient objection. But the alteration also materially ing a new varied the contract of the acceptor. It superadded a responsibility, being in place for [355] the nature of a request, by the acceptor to the other house to pay the bill; and payment, if that house had chosen so to understand it, and had paid the bill, the conse- vacates the quence would be, that the acceptor might become liable to an action at their acceptance suit. See 2 Taunt. 128; 13 East. 459, 14 id. 500; 3 Esp. 57. 246; 1 Camb. 82. n.

2. *COWIE V. HALSALL.* H. T. 1821. K. B. 4 B. & A. 197; 3 Stark. 36; Con- tra, *TRAPP V. SPEARMAN.* M. T. 1800. K. B. N. P. 3 Esp. 57.

In an action by the indorsee of a bill against the acceptor, it appeared that Or if bill, the acceptance was general, and that the drawer without the defendant's accepted knowledge, added to it, "Payable at Mr. Bidlake's, 48, Chiswell-street," generally, be made The judge before whom the cause was tried was of opinion, that such an alte- payable by ration vitiated the bill, and directed the jury to find a verdict for defendant. A the drawer motion was now made for a new trial. The Court said, an acceptance is a at a parti material part of a bill of exchange, and if altered vacates the instrument. In cular place; the present case the acceptance was at first general; the drawer afterwards such altera rendered it special. In the former case the acceptor undertook to pay the bill tion dis- at any place where he might be called upon; by the latter he undertook to charges the pay at the place named in the bill. This inconvenience would, therefore, ac- acceptor. crue to the defendant; the holder would present the bill at Bidlake's, where, of course, under the circumstances of the case, it would be dishonoured, and he might then, after sending by the post, notice of the dishonour, immediately sue out a writ, and arrest the acceptor. Rule refused. See 3 B. & B. 165; 2 H. Bl. 141; 1 M. & S. 735

4. *As to the amount.*

TRAPP V. SPEARMAN. M. T. 1800. K. B. N. P. 3 Esp. 57.

In an action on a bill of exchange, the alteration being as to the place of renders the bill void. payment, Lord Kenyon C. J. said as it was not an alteration in the time of payment, or in the sum, the bill was not void.

5. *As to the consideration.*

Inserting in a bill or note originally expressed to be for value received *generally*, such value to have been received on a *particular account*, will render the bill a nullity; *Knill v. Williams*, 10 East. 431. abridged, ante, 350.

6. *As to the indorsement.*

VINCENT AND OTHERS V. HORLOCK AND OTHERS. T. T. 1803. N. P. 1 Camp. 442.

Action against the indorsers of a bill of exchange. It appeared A., the payee, indorsed it in blank to defendants, who wrote over A.'s name, "Pay [356] the contents to Vincent and Co." without signing their own name. Lord Ellenborough said, if a payee indorse a bill in blank, the indorsee is entitled Where the payee of a bill indorses it in blank, the next holder may convert it into

a special indorsement.

to appoint the payment to be made to a particular person, which he is entitled to do by converting it into a special indorsement.

7. *By altering of a note into a bill.*

WEBBER v. MADDOCKS. E. T. 1811. K. B. N. P. 3 Campb. 1.

A promissory note before its negotiation may be altered into a bill of exchange without a fresh stamp.

Two persons being jointly indebted to another, agreed to give him a bill of exchange, to be drawn by one of the debtors and accepted by the other; instead of which they sent him a promissory note, made by the one and indorsed by the other, which he immediately returned to be altered into a bill of exchange, which was done accordingly. On the question being raised, whether this alteration did not make a new stamp requisite, Lord Ellenborough, C. J. said, that such alteration, only fulfilling the terms of the original agreement, might be considered as the correction of a mistake, and did not render a new stamp necessary, the instrument never having been negotiated as a promissory note.

An alteration in a bill which does not vary the responsibility of the party, will not vitiate it.*

Where a material alteration has been made, and there is no privy between the holder and the party sued, the former can not recover under the

(B) WHERE NOT VITIATED BY.

MARSON v. PETIT. K. B. Sittings after M. T. 1807. N. P. 1 Camp. 82.

Action on a bill of exchange, accepted by defendant. It appeared the name of Prescott and Co. had been written by the drawer under defendant's name without his knowledge. It was contended the alteration was material; but Lord Ellenborough said, the alteration does not vary the responsibility of the party, he is, therefore, still liable. *Sed vide Tidmarsh v. Grover, ante, p. 354.*

(C) OF THE HOLDER'S RIGHT TO RECOVER UNDER THE MONEY COUNTS.

LONG v. MOORE. H. T. 1790. K. B. N. P. 3 Esp. 155. note.

Assumpsit by the indorsee of a bill against an acceptor. After acceptance, the word *date* was inserted in the place of *sight*, in which form it had originally been drawn. The acceptor being thereby discharged, the plaintiff was desirous of availing himself of the common counts, and offered in evidence another bill drawn by the same drawer on the defendant for the same amount, but not accepted. Lord Kenyon, C. J. ruled that it could not be done, nor could the plaintiff recover at all against the acceptor, for he was liable only by virtue of the instrument, which being vitiated, his liability was at an end.

[357] common counts. Where from the political state of the two countries in which a bill was drawn and made payable, presentment could not be made for acceptance nor when it became due, for payment, the Court held that upon its being presented afterwards with delay presented and dishonoured, the holder might reco

IX. RELATIVE TO THE ACCEPTANCE OR NON-ACCEPTANCE OF A BILL IN GENERAL.

(A) WITH REFERENCE TO THE PRESENTMENT FOR.

(a) *When requisite.*†

PATIENCE v. TOWNLEY. H. T. 1805. K. B. 2 Smith. Rep. 223.

Action on a bill of exchange by the holder against one of the antecedent parties thereto. Defence, that it was not paid because not presented to the drawee for acceptance or payment in due time. It was however proved, that the delay was occasioned by the particular situation of the country in which the acceptor resided, the country being then occupied by an hostile army, and in a peculiarly critical situation; and that afterwards no *laches* could attach to the holder. as it was, when possible, presented without delay.—Verdict for plaintiff. Motion for a new trial.

Per Cur. *Duly presented* is presented according to the custom of merchants; which necessarily implies an exception in favour of those unavoidable

* So a bill of exchange is not vitiated by a third person through mistake cancelling the acceptance; Raper v. Birkbeck, 15 East. 17. So where an alteration is made with the consent of all the parties, in order to correct a mistake, it does not affect the validity of the bill; Kerhaw v. Cox, 3 Esp. 246, *ante*, p. 351.

† It is not incumbent on the holder to present the bill for acceptance before it is due; 1 Marsh. 616; S. C. 6 Taunt. 305; 1 T. R. 713; except upon bills payable within a limited time after sight, in which case it is necessary, in order to fix the period when it is to be paid; Beawes. pl. 226. p. 453. *vide text*. It is always advisable to procure the acceptance, as by that means the holder obtains the security of the drawee, and the bill becomes more negotiable; Mar. 48; Poth. pl. 143; Beawes. pl. 266; 2 Show. 496. And in all cases where a bill is remitted to an agent, it is his duty to apply for an acceptance, and he may be answerable for any loss his principal may suffer by a neglect; but such an omission does not affect the bill, if payable otherwise than after sight, nor the principal's right thereon; Beawes. 420; Mar. 12. 13.

accidents which must prevent the party from doing it within the regular time; ^{ver against} and it was properly left to the jury to say whether, from the situation of the ^{the antece-} country, it was possible for the plaintiff to present it in the regular course.—^{dent par-} Rule nisi refused. ^{ties.}

(b) *Time of*

1. *MULLMAN v D'EGUINO*. M. T. 1795. C. P. 2 H. Bl. 565. S. P. *GOUPY v. HARDEN*. M. T. 1816. C. P. 7 Taunt 159; S. C. 2 Marsh. 454; S. C. Holt, 342.

In debt on bond conditioned to pay certain bills drawn on India at 60 days ^{A foreign} after sight. in case they should be returned protested, defendant pleaded that ^{bill payable} they were not presented for acceptance within a reasonable time after the ^{after sight} drawing; it appeared that they were drawn on the 5th of March, 1793; that ^{must be pre-} they were indorsed on that day by defendant to plaintiff, who procured them ^{sented to} for a house at Paris; that plaintiffs sent immediate advice to the house at ^{the drawee} Paris, and on receiving their directions on the 30th April sent them to India, ^{for accep-} where they arrived on the 3d October; on the 5th October, the holder wrote in a reason- ^{tance with-} to the drawee, who was from home, desiring him to accept the bills, and on ^{able time,} the 17th October he sent an answer of refusal; some of the bills were there- ^{which is it} upon protested the 29th October, and the rest on the 18th November. Eyre ^{seems a} C. J. left the case to the jury, but told them he thought the bills had been ^{question} sent to India in time, as they were put up here for negotiation, and were ^{for the} therefore liable to be delayed, and that they were presented in India in time ^{jury.*} after their arrival. The jury found for the plaintiff; and on a rule to show cause why there should not be a new trial, and cause shown, the court was satisfied with the verdict, and plaintiff had judgment; observing, there would be a great difficulty in saying at what time such a bill should be presented for acceptance. The courts have been very cautious in fixing any time for presenting for acceptance an inland bill payable at a certain period after sight, and it seems to be more necessary to be cautious with respect to a foreign bill payable in that manner. We think, indeed, the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place; but the question, what is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine.

Where a bill was drawn in May payable at Lisbon, 30 days after sight, and being negotiated by the way of Genoa, did not reach the drawee till August, and the drawer had stopped payment in the mean time, and the drawee refused to accept, the Court thought it was presented in rea-

2. *GOUPY v. HARDEN*. M. T. 1816. C. P. 1 Marsh. 452; S. C. 7 Taunt. 159; S. C. Holt N. P. C. 342.

The defendant indorsed in London, and remitted to the plaintiff, at Paris certain bills of exchange dated May; and drawn by A. of London.—The plaintiff indorsed them to C. of Genoa, who also negotiated them; on their presentment for acceptance at Lisbon in August, B. refused to accept them, on the ground that the proper time for acceptance had expired; and that the drawer had become insolvent. The bills were however accepted; and on their dishonour, on presentment for payment, were paid by D. for the honour of C.; and the plaintiffs, as indorsers, paid the amount to D. The defendants counsel contended that the plaintiffs were debarred from their remedy by the *laches* that had occurred; because had the bills been sent to Lisbon directly, and not through the circuitous rout of Genoa, they would have been accepted before A's credit was lost with B. But Gibbs C. J. observed that it was not possible for the Court to prescribe any particular space of time within which a bill, payable at or after sight, ought to be presented for acceptance; he said that it was essential that all such bills should be presented, but that the period of such presentment was a point for the jury to decide; and that one thing absolutely necessary had been complied with in this case, namely, that the bills had been in circulation from the time they left London, till their arrival in Lisbon, whereas had they lain idle, the neces-

* It has also been holden to be a question of law dependant upon facts; see 6 East. 12; 1 T. R. 167. The presentment should be made during the usual hours of business; see East. 385; Mar. 112. But a deviation from that rule may be justified by a reasonable excuse; see 2 Smith. 223. *et supra*.

sity of immediate presentment would have arisen. A motion for a new trial was therefore refused.

3. *Fry v. Hill*. E. T. 1817. C. P. 7 Taunt. 397.

So with re- It appeared in this case that the defendant being indebted to the plaintiff, gard to in- gave, on the 9th of the month, by the hands of his bankers, who lived at land bills; Windsor, a bill of exchange, for the amount of the claim, payable one month [359] after sight at a banking house in London. The drawees, on presentment on for where a bill of ex- the 13th of the same month, refused acceptance, on account of the failure of change was the defendant's bankers, their correspondents at Windsor. The plaintiff there- drawn at fore brought this action for goods sold and delivered, the original cause of Windsor on action. It was contended for the defendant, that the plaintiff was bound by the 9th pay- his laches in presenting the bill for acceptance. The jury, however, found for able in Lon- the plaintiff; and on motion for a rule to show cause why the verdict should don after- sight, and not be set aside, Gibbs, C. J. said, the defendant's counsel have assumed, that was present it is incumbent on the holder of a bill payable after sight, to present it imme- ed for ac- diately for acceptance; but a holder of such a bill is allowed a reasonable time cept on the to present for acceptance, which is a question for a jury; and it is clear that 13th, and he is at liberty to circulate it previously. Though it has been said, per Buller, refused, it J. in *Muilman v. D'Eguino*, ante, 357. that such circulation must be uninter- was holden rupted. But as it does not appear what became of the bill between the times that it was of drawing and presentment, we must confine ourselves to the question, whe- presented ther the bill was presented within a reasonable time, and the jury have found sufficiently early. in the affirmative.—Rule refused.

(c) *Mode of.*

1. *CHEEK v. ROPER*. M. T. 1805. K. B. N. P. 5 Esp. 175.

The pre- Declaration against the drawer of a bill on default of acceptance To sentment for accept- prove the presentment to the drawee, a witness stated that he had carried the ance should be made to the drawee or his au- the bill to a house which was described to him to be the house of the drawee, and thorized a gent. that he offered it to some person in a tan-yard, who refused to accept it, but he did not know whether the person to whom he offered the bill was the drawee or not. Lord Ellenborough, C. J. was of opinion that the plaintiff could not recover, since, in order to render the drawer liable, he was bound to prove the acceptor's default; no such proof had been adduced; the evidence proved no sufficient demand on the drawee, as it did not show he was called upon to accept.

2. *CROMWELL v. HYNSEN*. M. T. 1797. K. B. N. P. 2 Esp. 511.

Indorsee against indorser of a foreign bill. When the indorsement was made *But if he Hynsen (a master of a ship) was in Jamaica, where the bill was drawn, but his has quitted the king- residence was at Stepney. The bill was presented for acceptance, dishonoured; and protested, and then sent to Hynsen's house for payment, with notice of dom, it will be suffi- non-acceptance. Hynsen was not then in England, but the bill was shown cient to pre- to his wife, and the circumstances stated to her. It was urged, 1st, That sent the bill notice should have been sent to Jamaica; and 2d, That the presentment for at his house acceptance was not sufficient; but Lord Kenyon, C. J. over-ruled both the objections.—Verdict for plaintiff.

[360]

(d) *Waver of.*

See post, div. With reference to the liability of the acceptor, and how discharged.

(B) WITH REFERENCE TO THE PERSON BY WHOM THE ACCEPTANCE IS TO BE MADE.

(a) *By agents.* See ante, b. 314.

(b) *By corporations.* See ante, p. 318.

(c) *By executors and administrators.* See ante, p. 320.

(d) *By infants.* See ante, p. 322.

(e) *By married women.* See ante, p. 324.

(f) *By partners.* See ante, p. 324; and post, title Partners

(g) *By several persons not in partnership.* See ante, p. 324.

(C) WITH REFERENCE TO THE TIME WHEN TO BE MADE.

(a) *Before the bill is drawn.*

PILLANS v. VAN MIEROP. E. T. 1785. K. B. 3 Burr. 1663.

On a rule to set aside a verdict, it appeared that one White, a merchant in Ireland, desired to draw on the plaintiffs, who were merchants at Rotterdam, in Holland, for 800*l.* payable to one Clifford, and proposed to give them credit on a good house in London for their reimbursement, or to adopt any other satisfactory method.

The plaintiffs desired a confirmed credit on a house of responsibility in London, as the condition of their accepting the bill; White named the house of the defendants, and offered credit on them; on which the plaintiffs honoured the draft, by paying the money, and then wrote to the defendants, desiring to know whether they would accept such bills, as they the plaintiff should, in about a month's time, draw on the defendants for 800*l.* on the credit of the said White. The plaintiffs having received an assent from the defendants, accordingly drew on them. In the interim, White failed before their draft came to hand, or ever was drawn; the defendants gave the plaintiff notice of the failure of White, and forbid their drawing in consequence; but the plaintiffs did notwithstanding draw, and the defendants refused to pay their bill.

After argument, the Court said, this is just the same thing as if white had drawn on the defendants payable to the plaintiffs. It had been nothing to the plaintiffs, whether the defendants had effects of White's in their hands or not. if they had accepted his bill. And this amounts to the same thing: "I will give the bill due honour," is in effect, accepting it. This is an engagement to accept the bill, if there was a necessity to accept it, and to pay it when due, and they could not afterwards retract. It would be very destructive to trade, and to trust in commercial dealings, if they could. Let the rule for a new trial be made absolute.

(b) *Within what time after the bill is left with the drawee for acceptance.*

INGRAM v. FORSTER. H. T. 1805. K. B. 2 Smith. Rep. 243.

The question raised in this case was, whether, when a bill was left for acceptance, and the drawer, after its remaining in his possession 24 hours, requires time to consider of it, and the holder grants him that time, the holder is not bound to give immediate notice to his indorser of the particular circumstance of such request and of the delay granted; although he is not bound to present the bill for acceptance, Marius, edit. 3. p. 61. was cited, where he says, "No three days for acceptance," and also another paragraph entitled "24 hours for acceptance;" and it was contended that from the whole of those passages it was clear that they applied to inland as well as foreign bills; and that the party presenting ought to demand an answer whether the bill will be accepted or not within 24 hours. Lord Ellenborough, C. J. observed that the law of merchants at Hamburg, and which prevails all over the continent of Europe, is, that where a bill is kept more than 24 hours after acceptance, it amounts to an acceptance, and he should wish this point to be settled, and that it should be inquired whether, when bills are left for acceptance; there is not a specific time when they should be returned; and whether, if the holder allows further time, he should not inform his indorser, and put him in as good a situation as himself?

(c) *Where a bill is payable after sight, at what time deemed to have been made.*

GLASSOP v. JACOB. T. T. 1815. K. B. N. P. 4 Campb. 227.

In an action against the acceptor of a bill payable 60 days after sight, it appeared the acceptance was, "Accepted 25th October, 1814. B. Jacob." The signature was only in Jacob's hand writing; whose the other words were did not appear; but it was proved to be usual for a clerk to write "accepted" and the date, and for the drawee then to subscribe his name.

Lord Ellenborough, C. J. said, that he should leave it to the jury to presume the words were written with the defendant's privity when he accepted the bill, unless defendant could show that the date was written at some other time.—Verdict for plaintiff.

(d) *After the bill is payable.*

* See post, Acceptance by implication, p. 362. n.

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Action of *assumpsit* on a bill of exchange brought against the acceptor; wherein the plaintiff declared, that one D. of Bristol, on the 25th of March, 1696, drew a bill of exchange on the defendant, payable to the plaintiff within a month; that on the 16th day of May, 1697, the defendant accepted the bill, and promised to pay according to the tenor and effect of the bill; on *non assumpsit* pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the *assumpsit* was impossible, because made a year after the time the bill became due. But judgment was given for the plaintiff; for it appearing on the declaration, that the acceptance of the bill was after the day of payment, the according to the tenor and effect, must be understood to pay the bill presently; but if it had appeared on the declaration, that the acceptance was before the day of payment by the bill, there, on the evidence, an acceptance after would not have maintained the action.

(D) WITH REFERENCE TO THE MODE IN WHICH IT IS TO BE MADE.

(a) *By implication, or by a separate instrument.*

1. LUMLEY v. PALMER. M. T. 1735. K. B. 2 Stra. 1000; S. C. Ca. Temp. Hard. 74; S. C. 3 Rac. Ab. 611. S. P. ANON. M. T. 1698. K. B. N. P. 12 Mod. 345.

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c. 78. an
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The defendant was sued as acceptor of a bill of exchange; and on the evidence it appeared to be a parol acceptance only, which the C. J. ruled to be sufficient, that being good at common law, and stat. 3 & 4 Ann. c. 9., which requires it to be in writing, in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. On this direction the jury found for the plaintiff. But the C. J. of C. B. having shortly before ruled it otherwise in the case of *Rea v. Meggot*, the Court was moved for a new trial. And after argument the Court was of opinion, that the direction in the present case was right, and agreeable to constant practice, and therefore ordered the *postea* to be delivered to the plaintiff.

2. PILLANS v. MIEROP. E. T. 1765. K. B. 3 Burr. 1663.

[363].
Or on a se-
parate in-
strument.

White drew on the plaintiffs at Rotterdam for 800*l.* and proposed to give them credit upon the defendant's house in London; the plaintiffs paid White's bills, and wrote to the defendants to know *whether they would accept such bills as they the plaintiffs should draw in about a month upon them for 800*l.* on White's credit*, the defendants answered that they would, but White having failed before the month elapsed, the defendants wrote to the plaintiffs not to draw. The plaintiffs did however draw; and on the defendants refusal to pay, brought this action; and the Court held that the defendant's letter was a virtual acceptance to the amount of 800*l.*

3. CLARKE AND OTHERS v. COCK. T. T. 1803. K. B. 4 East. 57. S. P. PIERSON v. DUNLOP. H. T. 1777. K. B. Cowp. 571.

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A. B. authorized the defendant to receive certain African bills, of which he sent him a list, and apprized him that he had drawn upon him for the amount. The defendant by letter acknowledged the receipt of the list, and assured A. B. that the bills he had drawn on him "should meet with due honour." The plaintiffs, who were A. B.'s bankers, and greatly in advance to them, having refused to give them further credit, he indorsed to them the bills which he had so drawn upon the defendant, and at the same time either communicated the purport of the defendant's letter, or else represented his having made an absolute promise to accept, but did not show the letter itself, and the plaintiffs on the faith of defendants promise advanced to A. B. the full amount of the bills. The defendant afterwards wrote to A. B. that the African bills had been attached, and A. B. in answer desired him to refuse acceptance of the bills drawn on him. The defendant did in fact receive the amount of the African bills

* This statute enacts, that after the 1st of August, 1821, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill on one of the said parts.

before the bills on him became due · but the amount was afterwards attached in his hands, and upon that attachment he paid over the money so received. This action was brought against the defendant as acceptor of the bills drawn by A. B. A verdict was found for the plaintiff, subject to the opinion of the Court. The Court held that this was a good acceptance, and that the subsequent circumstances had not done it away ; and therefore awarded the *possession* to the plaintiff, and observed, it has been laid down in so many cases that a promise that a bill when due shall meet due honour amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject. Then here was an undertaking by the defendant in writing by a collateral paper to accept the bill, which induced a credit, without which the plaintiff would not have given value for it. The defendant has thereby enabled another with truth to assert (and furnished him with the means of proving that assertion by the production of the defendant's letter) that he had undertaken to accept the bill, which in ordinary mercantile understanding amounts to an acceptance, and by that credit was attached to the bills. Then the hardship of which the defendant now complains, having had the other bills of A. B. attached in his hands, has grown out of his not fully understanding the legal effect of what he had done, and is not imputable to the plaintiffs. The defendant might have besides resisted the attachment on the ground of his acceptance, which would have been a defence to him. This acceptance being by writing comes within all the cases cited. It would be good, according to some, even by parol ; but that an acceptance is good by collateral writing is clear from *Pillans v. Van Mierop*, *ante*, p. 363. and other cases. See 1 East. 98 ; 1 Stra. 648 ; Rep. Temp. Hard. 74 ; 1 Atk. 611 ; Doug. 247, 297 ; Cowp. 573.

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4. JOHNSON AND ANOTHER V. COLLINGS, M. T. 1800. K. B. 1 East. 98. Though a promise to accept a bill to be afterwards drawn was no acceptance of the bill when drawn, and could not be sued upon by a party between whom and the drawee no communication passed at the time of taking the bill ; and indeed it may be doubted whether, in any case, a promise to accept a non-existent bill would have been considered as an acceptance of the bill when drawn.

Indorsees against the acceptor of an inland bill of exchange. A. having furnished goods to the defendant to the amount of the bill in question, applied to him for payment ; when the defendant said that if he would draw on him a bill at two months for the amount, he should then have money, and would pay it. A. afterwards drew the bill in question, at two months, payable to his own order ; but it was not presented to the defendant for acceptance, nor did he ever in fact accept it, otherwise than as is before stated. A. the payee having indorsed the bill, passed it to plaintiffs in discharge of an old debt, but there was not any communication at that time between the plaintiffs and defendant. A. becoming a bankrupt before the bill became due, defendant refused payment. Le Blanc, J. being of opinion that the promise of the defendant did not amount to an acceptance, nonsuited the plaintiffs. On a motion to set aside the nonsuit, the Court said, this was a promise to accept a non-existing bill ; and that they did not know by what law they could say that such a promise was binding as an acceptance ; that by the general rule of law, a *chose* in action by a bill of exchange, was founded on that law, and could not be carried further than that would warrant it ; that there had not been cited any authority to show that by the law of merchants a mere promise to accept a bill to be drawn in future amounted to an actual acceptance of the bill when drawn, and that the plaintiffs could therefore neither recover on the bill, nor on the general counts. Lord Mansfield's judgment in the case of *Pierson v. Dunlop* (Cowp. 573.) was adverted to, where he said, " it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, *he will duly honour it*, is no acceptance unless accompanied with circumstances which may induce a third person to take the bill by indorsement ; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer ; upon which they observed that they thought that the admitting a promise to accept before the existence of a bill to operate as an actual acceptance of it afterwards, even with the qualification mentioned by his lordship, was carrying the doctrine of implied acceptance to the utmost verge of the law, and that they doubted whether it did not even go beyond the proper boundary. See *Beawe's Lex. Merc.* 454. pl. 16 ; and

amounting to an acceptance, the intention to accept ought to be expressed in clear unequivocal terms. They were of that nature in these two cases; but here the phrase, which is relied upon as acceptance, is, to say the least, ambiguous; it may mean nothing more than this: I will look into the accounts between us: I will attend to the request so far as to inquire and examine. If it could have been shown that the words bore this peculiar meaning, which is sought to be affixed to them, in the mercantile word, it might have been sufficient, but this has not been done. The evidence, however, such as it was, was fit for the consideration of the jury; and they were asked by the learned judge who tried the cause, whether they amounted to an acceptance, and they were of opinion that they did not.

7. **ANDERSON V. HICK AND OTHERS.** H. T. 1812. N. P. 3 Camp. 179.

Action by payee against the acceptor of a bill of exchange. It appeared the bill had been left at defendant's counting-house for acceptance, but was returned unaccepted. Soon after plaintiff met one of the defendants, and inquired the reason the bill had not been accepted. Defendant answered, "if you send it again, I will give directions for its being accepted." The plaintiff not being able to prove the bill had been sent again to defendant's counting-house, Lord Ellenborough held the promise to be conditional, and that it could not operate as an acceptance until that condition had been performed. Plaintiff nonsuited.

8. **POWELL V. JONES.** E. T. 1793. K. B. N. P. 1 Esp. 17.

Action against acceptor of a bill. To prove the acceptance, it was stated that when the plaintiff's clerk called for the bill, after having left it for acceptance, the defendant returned it, saying, there is your bill, it is all right." On objection, Lord Kenyon, C. J. said, these words could by no implication amount to an acceptance.—Plaintiff nonsuited.

9. **ANDERSON V. HEATH.** T. T. 1815. K. K. 4. M. & 403.

A bill for 2000*l.* at 60 day's sight, was presented to defendants, the drawees, on the 2d of August, 1814, for acceptance, which they refused, and it was protested. At the end of 60 days (5th of October,) it was brought for payment, and one of the defendants said, "this bill will be paid; but we cannot allow you for a duplicate protest, which was charged;" and he was about to pay the bill; but the clerk who brought it said, "he could not receive the payment without all the charges, without further orders;" and he went away for instructions. He returned in half an hour; but in the interim defendants had learnt that the drawer had failed, and they refused payment. An action was brought, on the ground that the saying "the bill would be paid" was an acceptance; but on case reserved, the Court held it was not; it was said, *alio intuitu*; acceptance did not enter into the contemplation of either party at the time; they thought of immediate, not of future payment; defendants did not think of giving a pledge, nor the clerk of receiving one.—Rule absolute for a nonsuit. See Gilb. L. E. 115; 1 Lord Raym. 364. Salk. 127; Carth. 429; 6 East. 199.

10. **NEAL V. READ.** E. T. 1823. K. B. 1 B. & C. 657.

In this case it appeared that the plaintiff had sold certain goods to A. B., for the price of which the latter drew three sets of bills upon defendant. The plaintiff wrote to the defendant, expressing his hopes that he would protect all the bills drawn by A. B., to which defendant answered, that he had paid the first set of bills; and added, "I can say nothing, however, more at present about the other bills, as the fate of them will depend (not being accepted) upon the state of A. B.'s account when they become due." The defendant afterwards paid the second set of bills, and informed the plaintiff, in a letter, "that he did not know what would be the fate of the third set, which had then appeared for acceptance, but that he would do all he could to prevent loss to the parties." The Court held, that these letters did not amount to an acceptance, and could not have the effect of appropriating to the payment of the bills, whatever monies the defendant might receive on account of A. B. for the price of which the bill was drawn, that they could say nothing about the bill, as its fate must depend upon the state of the vendee's account when it became due;

So saying "send the bill to my counting-house, and I will give directions for its being accepted," was not considered an acceptance unless the bill was shown to have been sent.

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So where the drawee of a bill, on presentment for payment, said, "this bill will be paid, but we cannot allow you for a duplicate protest," and the holder refused to receive payment with out the charges of such duplicate protest, this was held not to amount to an acceptance.

So where the drawee of a bill answered, to an application by the vendor of goods for

So where the drawee said the bill "would be taken up when due."

11. *SAYER v. KITCHEN.* M. T. 1795. K. B. N. P. 1 Esp. 209.

Action against acceptor of a bill of exchange. The only evidence to prove the acceptance was, that the bill had been left at defendant's house for acceptance, and when called for, defendant was not at home, but the answer was, "that the bill would be taken up when due. But Lord Kenyon, C. J. ruled the answer not to be an acceptance.

So proof that the drawee said he would help the holder if he could, [368] for that he had then some effects, and desired that the bill should be left in order that he might examine into it.

12. *CLAVEY v. DOLRIN.* T. T. 1736. K. B. Ca. Temp. Hard. 277.

Action upon an inland bill of exchange against the acceptor; the evidence of an acceptance was this; the bill having been presented for acceptance, and refused by the drawee, because he had no effects, was returned into the country; and a little while afterwards, the bill being hazardous, plaintiff's agent met the drawee, and asked him if he could not help to secure him his debt, and he said he would if he could, for he had now some effects in his hands; whereupon the agent immediately wrote for the bill, and presented it to the drawee, who bid him leave the bill, and he would examine into it, and it was left with him eight or ten days, and then the agent called again, and the drawee offered to let him sell some of the effects, and pay himself, which the agent refused, and thereupon this action was brought; and, Per Lord Hardwicke, C. J. Indeed, it has been adjudged, that a parole acceptance will be good; and possibly leaving the bill 10 days with the drawee might, of itself, be such a consent as to amount to an acceptance. But this is not so; for you must take the whole of the transaction together. There must be evidence of a contract, to charge the acceptor, which cannot be collected from the evidence.

So where a request was made to defendant to accept a bill, and to secure him self by drawing a bill to the amount on a third person, it was holden that the mere act of drawing such bill did not amount to an acceptance.

13. *SMITH v. NISSEN.* T. T. 1786. K. B. 1 T. R. 269.

A. B. ordered goods of the defendant, and desired him to draw on the plaintiff for the amount, which he did. Plaintiff wrote two letters to the defendant; one, saying he could not accept, because the defendants had sent more goods than were ordered, but that he had written to A. B., for further directions; the other, saying he had written to A. B., and was waiting his answer before he could accept, but he desired the holder to keep the bill. In the mean time, A. B. desired the plaintiff to accept, and to draw on one C. D. for the amount. He accordingly drew on one C. D., who refused to accept, and upon that he paid the bill, for the honour of the defendant, and brought this action against him for money paid. The plaintiff obtained a verdict; but defendant moved for a new trial, on the ground that the drawing on C. D. was an acceptance of the bill drawn by defendant. Sed per Cur. What plaintiff did, did not amount to an acceptance; for he never meant to make himself liable, unless the bill he drew was accepted and paid.—Rule refused.

14. *HARVEY v. HARTIN.* After M. T. 1807. N. P. 1 Camp. 25; S. C.

Bayley on Bills. 149

Action by payee against acceptor of a bill of exchange. It appeared that plaintiff sent the bill to defendant by post, requesting him to accept it, and hand it over to plaintiff's agent, as was customary, between the parties. Plaintiff, hearing nothing about the bill from his agent, wrote to defendant, who answered his letter by saying, he once intended to accept it, but he now declined. Lord Ellenborough said, if a bill is left for acceptance, and the drawee retains it, such retention is an acceptance, although he never writes his name upon it.

15 *MASON v. BARFF.* M. T. 1818. K. B. 2 B. & A. 26. S. P. *FERNANDEY v.*

GLYNN. M. T. 1807. K. B. N. P. 1 Campb. 426. note.

A protracted detention of a bill left for acceptance was for merly equivalent to an actual acceptance.

[369] Though in order to create such an implied acceptance very special circum-

A. B. was accustomed to draw on the defendant for woollens sent to him. In August, 1814, plaintiff, who used to discount the bills, sent one by letter to defendant, and defendant returned it accepted, but said it would be well for the future if plaintiff would enquire whether the woolls were delivered to the carrier, add the invoices and carrier's acknowledgment sent, and in such case the bills would be accepted without delay. On the 25th of February, plaintiff sent another bill for acceptance, which arrived on the 27th; but defendant, not having received remittance of the invoice, &c. omitted returning it till the

8th of March, and then sent a letter to say he could not accept because he had not received the invoice, &c., and said he had kept it during the interval on a promise from A. B. that the invoice should be sent. This letter arrived on the 11th of March, on which day, before its arrival, plaintiff sent another bill for acceptance, making no mention of the former bill. Defendant kept both bills until the 25th of March, and then sent back both unaccepted. Plaintiff insisted that defendant's conduct amounted to an acceptance of both, and brought an action on them; as to the tenability of which the Court observed, constructive acceptances ought to be watched with the utmost care; for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract; but it is laying down a very loose and dangerous rule when any degree of latitude is given to cases of constructive acceptances. Now supposing that the detention of the bill would, in some cases, in point of law, amount to an acceptance, does it clearly appear in this case, that by such detention the defendant meant to charge himself in that character? On the contrary, is it not evident, that as the plaintiff knew the bills would be accepted without delay, if the invoices, &c. were sent, he must have concluded, from the delay, that defendant was waiting for them; that his making no remonstrance when he wrote on the 11th of March implied that he so considered it; and his making no reply to the letter of the 8th of March showed that he did not then consider silence as an acceptance; and had he meant so to consider it, he should at once have written to say so to defendant, because that would have prevented his keeping the second bill, and would have put him upon getting funds for the first.—Judgment for defendant. See 1 Campb. 426; *Trimmer v. Oddy*, Guildhall Sittings, 1800. M. S.; *Chitty's Bill's of exchange*, 160.

16. *JEUNE v. WARD*. T. T. 1818. K. B. 1 B. & A. 653; S. C. 2 Stark. N. P. C. 326.

A. B. was entitled to a 200*l.* legacy under a will, to which defendant was an executor, and he drew upon defendant for 150*l.* at sight in favour of plaintiff, who was a creditor. The bill was drawn on the 28th of May. On the 29th plaintiff went to defendant, who lived in the country, and left the bill for acceptance. In June plaintiff wrote to defendant's solicitor, C. D., saying defendant had refused to accept the bill, desiring his assistance to get payment from the drawer. C. D. apprised him when the legacy was to be paid, and A. B. having received it without paying plaintiff, plaintiff applied to the defendant to return the bill; to which defendant replied, that having also been applied to by A. B.'s mother to send it her, he had, to avoid trouble, destroyed it. Plaintiff brought an action, on the ground that the destruction was tantamount to an acceptance, and of that opinion was Lord Ellenborough, and verdict for plaintiff. On rule *nisi* for a new trial, and cause shown, Lord Ellenborough retained his opinion: and Holroyd, J. thought, that in general, destruction was equivalent to acceptance; but as there was a refusal to accept and plaintiff seemed to consider defendant not liable in June, he thought there ought to be a new trial, to put the facts upon the record. Bayley and Abbot, Js. thought that, under the circumstances, the destruction was no acceptance; and—Rule absolute. Bayley, J. doubted whether, in any case destruction would do more than subject the party to an action of trover.

(b) *By writing on the bill itself,*

By the 1 & 2 Geo. 4. c. 78. ante, 362. n. no acceptance shall be valid, unless made in writing on the bill. An acceptance in pencil, it seems would suffice; see *Greary v. Phillips*, post.

(E) WITH REFERENCE TO THE TERMS IN WHICH IT IS TO BE MADE.

(a) *When absolute.**

WILKINSON v. LUTWIDGE. M. T. 1726. K. B. 1 Stra. 648.

In an action on the case on the bill of exchange against the acceptor a question arose as to the validity of the acceptance. The bill was drawn from New England, for a sum of money advanced there to fit out a ship that had

* An absolute acceptance is an engagement to pay according to the tenor of the bill.

drawee that he would pay if another person did not, was construed to be an absolute acceptance.

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put in there, after having been taken by pirates. The bill was drawn on the defendant, who was the frieghter; and he living at Whitehaven, the plaintiff applied to a merchant in London, who was his correspondent, to get him to send this bill, and another of 150*l.* drawn by the same person, and on the same account. He sent both bills inclosed to the defendant, who by letter acknowledged the receipt of them, and wrote thus; "The two bills of exchange which you sent me, I will pay them in case the owners of the Queen Anne do not; and they living in Dublin must first apply to them I hope to have their answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do, which I request you will acquaint Mr. Wilkenson with, and that he may rest satisfied of the payment." In another letter he wrote, "I have not had an opportunity of sending the bills you sent me, to the owners of the Queen Anne, to Ireland, but will take the first opportunity, and then shall remit to the gentlemen concerned, according to my promise." The defendant on this paid the 150*l.* bill; but in defence to the action insisted that it did not amount to any acceptance, being only conditional to pay it in case the owners of the Queen Anne did not; and his promise to procure it from them was in favour of the plaintiff. But Raymond, C. J. was of opinion that it was an absolute acceptance.

(b) *When conditioned..**

A conditional acceptance bound the drawee, and he came absolute as soon as the condition was fulfilled.

1. MILN V. PREST. H. T. 1815. N. P. 4 Camp. 393; S. C. Holt. 181.

This was an action by the indorsee against the acceptor of a bill of exchange. It appeared the drawer purchased wheat for defendant, and in a letter to him defendant promised to accept bills for the amount as soon as he had notice of the grain being shipped. It further appeared (before plaintiff received the bill he had shown the defendant's letter,) on the bill being presented for acceptance, defendant refused to accept until the wheat arrived; soon after it did arrive, and defendant sold it but still refused to accept. The question was, whether these facts constituted an acceptance. *Gibbs, C. J.* said the letter having been shown to plaintiff, he made it an acceptance, otherwise the letter itself did not amount to one. He admitted a conditional acceptance to be valid if the condition be performed, which he thought was fulfilled in this case. Verdict for plaintiff.

2 PIERSON V. DUNLOP AND ANOTHER. H. T. 1777. K. B. Cowp. 571.

Hence an answer "that the bill would not be accepted till a navy bill was paid;"

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This was an action brought by the plaintiff against the defendants, as acceptors of a bill of exchange, drawn by one Robert Mac Lintot, upon them, for the sum of 300*l.*, payable fifteen days after sight, to the order of William Nicholl, which bill had been indorsed over to the plaintiff. The facts in this case were in substance as follows; Mac Lintot drew upon the defendants in favour of Nicholl, and gave Nicholl a navy bill, assigned to the defendant's, as a security till the bill of exchange should be accepted. Both bills were sent to the defendants, who said, the bill of exchange would not be accepted till the navy bill was paid; but they would receive the money on the navy bill; and they wrote to Mac Lintot, saying his bill would receive due honour, but it was drawn too short, being payable before the navy bill. The plaintiff obtained a verdict, but the defendant had a rule to show cause why there should not be a new trial, and insisted that the letter to Mac Lintot, upon which the jury had in some measure relied, was no acceptance; but on cause shown, the Court said, what the defendant did is an acceptance. It has been truly said as a general rule, that the mere answer of a merchant to the drawer of a bill, saying he will duly honour it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. In this case there is great reason to say that what the defendants did was equivalent to an acceptance. There may be a conditional as well as an absolute acceptance. What then is this declaration by the defendants but an undertaking that the

* An acceptance of this description is where the drawee only subjects himself to the payment of the bill upon the happening of a contingency.

bill should be accepted when the stores were paid for? After this he writes to the drawer, saying, "he would honour the bill, but he should not have drawn it at so short a date, as it would be due before the stores were paid for." This is an admission that he looked to the navy bill, as the fund out of which the bill of exchange was to be paid, and after he had actually received the money upon the navy bill, he was bound to pay it to the plaintiff. Rule for a new trial refused.

3. *SPROAT v. MATTHEWS*. E. T. 1786. K. B. 1 T. R. 182.

The drawee of a bill of exchange when the bill was presented to him for acceptance, stated that a ship was consigned to him and a person in Brisol and that till he should know to what port the ship should come, he could not accept: but afterwards, on a subsequent application, he said the bill should be paid though the ship should be lost. The plaintiff noted the bill for non-acceptance. The ship did afterwards arrive, and the defendant disposed of the cargo. In an action against the defendant, as acceptor, *Buller, J.* who tried the cause, held that the acceptance was conditional only, and that the noting showed the plaintiff did not choose to take it, and directed a nonsuit. And upon a rule to show cause why a new trial should not be granted, the Court (*Ashurst* and *Buller Js's.*) agreed that the acceptance was conditional only; but *Willes, J.* thought if there was a doubt whether it was conditional, or whether the plaintiff had precluded himself from insisting upon it, all the facts should have been left to the jury. He thought the nonsuit ought to be set aside. Rule discharged.

4. *SMITH v. ABBOT*. E. T. 1740. K. 2. Stra. 1152; S. C. by the name of

SMITH v. SCARFFE. 7 Mod. 426.

The defendant accepted a bill of exchange, to pay it when the goods consigned to him, and for which the bill was drawn, were sold, and the plaintiff declared on the custom of merchants. After a verdict for the plaintiff, it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of the goods, was not within the custom of merchants, or negotiable. But the Court, (on consideration) held it good.

5. *LAING v. BARCLAY*. H. T. 1823. K. B. 1 B. & C. 398; S. C. 2 D. & R. 530.

A. and B., merchants in London, being applied to on behalf of C., resident at Demarara, to give him a letter of credit for 30,000*l.*, to enable him to purchase produce to load certain vessels for the port of London, and to accept his drafts at 90 days' sight. On receiving invoice, bill of lading, and order for insurance to the extent of certain fixed prices for various kinds of produce, wrote to C., stating that he consented to make the advances required upon the terms described, and that, upon receiving the documents before-mentioned, and no irregularity appearing, they would accept his drafts at the usual date, to the extent of 30,000*l.* C. shipped produce to the value of 800*l.* on board one vessel, and to the value of 1000*l.* on board another, and sent the necessary documents to B. & C., and directed the surplus of the proceeds of the first cargo (after repaying the advances of A. & B.), to be paid to D. in London; and that the surplus of the second should be held by them, to abide by his future advice. C. afterwards drew a bill upon A. & B. for 500*l.*, at six months' sight, and did not specify to the account of which cargo it was to be charged. A. & B. refused to accept it, and C. having thereupon brought an action against them for non-acceptance, the jury found their verdict for the plaintiff. It was now urged, that A. & B. only bound themselves conditionally, provided no irregularity appeared; that there was an irregularity, in the plaintiff not stating to the account of which ship it was to be placed; that one of the terms at which the bills were to be drawn was at 90 days' sight, or the usual date; that the former words explained the latter; and therefore, as there was no proof that six months after sight was the usual date, there was another irregularity committed by the plaintiff in drawing the bills at six months after sight, which would be much to the prejudice of the defendant in the event of the insolvency of the plaintiff.

Per Cur. We feel no difficulty in saying that judgment ought to be in fa-

were drawn your of the plaintiff. A contract is entered into between the plaintiff and A. & B., by which the latter undertakes, upon certain conditions, to accept the bills of the plaintiff, to the amount of 30,000*l.* Now it is clear that they never intended to give any credit to the plaintiff, and that they never meant to accept any bills without having the means of meeting them in their hands before they gave their acceptance; but when they once had the means of providing for the bills, that they would then accept any bills which were drawn in the usual way of trade. The plaintiff performed his part of the contract; he transmitted at different times, to A. & B. the invoices and bills of lading of the ships, with orders to insure the goods on board, and afterwards he drew a bill for 500*l.* at six month's sight, on A. & B. which they, having received the invoices, bills of lading, and orders, refused to accept. The reasons they assign are, that they had not been advised to what account it had been drawn. They had it in their power, therefore, to place it to whichever account they pleased; though there was a great irregularity in drawing the bill at six months after sight, instead of 90 days; but the jury have found that the date was not unusual. It is true, that by its long date, if the plaintiff became insolvent, their remedy might be delayed; but, on the other hand, by a long date, they would be enabled the better to dispose of the cargoes, and be ready to meet the bills. It is clear, therefore, that the bills which they meant not to accept were such as might be drawn for *less* than 90 days. Upon the whole, therefore, we think that this contract, having been made between merchants, ought to be liberally construed, and that the plaintiff has done more, in fact, than his part, for all the matters objected against him are much to the benefit of the defendant.—*Postea* to the plaintiff.

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An acceptance to pay part of the sum for which the bill is drawn is valid.

So an acceptance varying from the tenor of the bill.*

An accommodation acceptor even, in the absence of any express contract, is entitled to be indemnified.†

(F) WHEN PARTIAL OR VARYING FROM THE TENOR OF THE BILL.

1. *WEGERSLOPE V. KEENE*. M. T. 1720. K. B. 1 Stra. 214.
Action on a foreign bill against acceptor. It appeared that the bill was drawn on him for 100*l.*, and he accepted it to pay part thereof. On demurrer, it was insisted that a partial acceptance was not good within the custom of merchants. But the Court held it valid, for either party might have refused this partial acceptance, and they were at the same liberty to take it; neither could force the other to receive it; but if they agree, there is no injury done to a person who is willing.

2. *PETIT V. BENSON*. T. T. 1697. K. B. Comb. 452.

A bill was accepted to be paid half in money and half in bills; and the question was, whether there could be a qualification of the acceptance; and it was proved by several merchants that there might, for the drawee might refuse the bill totally, or accept it in part, but that the holder was not bound to acquiesce in such acceptance.

(G) WITH REFERENCE TO THE HOLDER'S RIGHT TO INSIST ON AN ABSOLUTE ACCEPTANCE.

The holder of a bill is entitled, from the undertaking of the drawer and indorsers, to demand an absolute acceptance of the drawee; Mar. 22, 2d edit.; and may treat an offer of a qualified one as equivalent to an absolute refusal.

(H) WITH REFERENCE TO THE RIGHTS OF THE ACCEPTOR.

(a) *To be indemnified by drawer.*

YOUNG V. HOCKLEY. M. T. 1772. C. P. 3 Wils. 346.

On the 25th of June, bankrupt, the defendant, drew a bill of exchange for his accommodation on the plaintiff, payable one month after date to his own order, which the plaintiff on the same day accepted. On the 12th of July a commission issued; the bill became due on the 28th of July, when the plaintiff paid it. The bankrupt obtained his certificate on the 5th of September, which was allowed on the 8th of October. In an action against the defendant, the Court held the certificate no bar.

* Or to pay at a different time; Molloy. 283, or place; see 4 M. & S. 162; 4 B. & A. 198.

† He may therefore retain money of the drawer, which comes fairly into his hands, until the bill is delivered up, or he receives sufficient indemnity; *Maiden v. Kempster*, 1 Campb. 12. abridged *post*. So an acceptor may retain funds to indemnify himself against

(b) *To alter his acceptance*

See ante, div. Alteration, p. 343 & 354.

(c) *To revoke his acceptance.*

1. **TRIMMER v. ODDIE.** 1800. N. P. cited 6 East. 200; S. C. 2 Smith. Rep. 338. S. P. **THORNTON v. DICK.** H. T. 1803. N. P. cited 2 Smith. Rep. 338.

It appeared in this case that a bill of exchange had been left for acceptance, and had been accepted; but that the acceptance had been afterwards cut off, and the bill returned in that mutilated state. Lord Kenyon, C. J. was of opinion, that the acceptance once made could not be revoked, and that the acceptor was still bound.

2. **BENTINCK v. DORRIEN.** H. T. 1805. K. B. 6 East. 199; S. C. 2 Smith Rep. 337.

Per Lord Ellenborough, C. J. The rule is certainly laid down in the Hamburg Ordinance as stated, that an acceptance once made cannot be revoked, though to be sure that leaves the question open as to what is an acceptance, whether it be perfected before the delivery of the bill; but I should consider the general question as one of great magnitude, and worthy to be considered in the most solemn manner before it is decided; that after an acceptance was clearly made it could be explained away by any obliteration of it *ex parte*. I can readily conceive that great inconvenience would ensue from letting in such a practice.

3. **COX v. TROY.** H. T. 1822. K. B. 5 B. & A. 474; S. C. 1 D. & R. 38. A bill on defendant and Co. was put into their bill box for acceptance, 24th of May, 1820. They wrote an acceptance upon it, and dated it the 24th of May, 1820. The bill was not called for until the 27th of May, and before that time the acceptance was erased by inking it over. When or by whom that was done did not appear. Plaintiff brought an action, on the ground that the writing the acceptance bound the drawee, and that he could not afterwards cancel his acceptance; but on a case reserved; the Court were clear the acceptance might be cancelled at any time before it was delivered out by the drawee, and they ordered the *postea* to be delivered to the defendants. See *Traite du Contrat de Change*, part i. ch. 3. s. 3. pl. 44; *Emerigon Traite des Assurances*, ch. 2, s. 4. p. 45; *Cours de Droit Commercial*, by J. R. Pardessus, Paris, 1814. part ii. tit. 4. chap. 4. sect. 4. s. 1. p. 400.

4. **RAPER v. BIRKBECK.** T. T. 1812. K. B. 15 East. 17.

It appeared that a bill of exchange having been accepted payable at Ladbroke's, with a direction in writing on it "in cases of need to apply at Boldero's;" and having been dishonoured when due at Ladbroke's, and thereupon brought to Boldero, who thinking that it had been made payable at his house, under that mistake cancelled the acceptance; but presently observing the mistake, wrote under it "cancelled by mistake," and signed his initials to it: yet nevertheless paid the bill for the honour of the plaintiff, whose indorsement was on it. One of the prior indorsees subsequently called at Boldero's for the bill, in order to pay it; but finding that the acceptance had been cancelled, refused to take it up. Upon these facts a verdict was found for plaintiffs. A rule nisi had been since obtained for a new trial, on the ground that the cancellation in fact, though accidental, threw a difficulty upon the defendants of recovering over against the prior indorsers, as it would be necessary to go through the same *media* of proof to establish their claim over against such prior indorsers; a difficulty which ought not to be thrown upon them, especially by the act of the then holders of the bill; and which difficulty might be in-

his acceptances, though outstanding more than six years: *Moore v. Williams*, 8 Campb. 418. abridged *post*. So if a man who has funds in his hands belonging to a trader, who has committed a secret act of bankruptcy, accept a bill for that trader without knowledge of the act of bankruptcy, he may apply those funds to pay such acceptance, though a commission may have issued in the mean time: *Wilkins v. Casey*, 7 T. R. 711. abridged *ante*, vol. iii. p. 718. And since the 49 Geo. 3. and 6 Geo. 4. an accommodation acceptor may prove under the drawer's commission, though he has paid the bill after the bankruptcy.

creased by the death of any of the witnesses in the mean time; and therefore it was contended, that this action did not lie.

Per Cur. Indorsees are bound to return a bill of exchange to the indorsers unchanged by any act of theirs. This has been done in the case before us; for although the bill was altered by Foldero, he had no authority from the plaintiff, express or implied, to do the act; the whole originated in his mistake. Pothier, in his Treatise on Bills of Exchange, (2 vol. 114. part. 1 ch. 3. s. 3.) speaking of an acceptor who has put his signature to a bill, but has not parted with it says; that before he does part with it, "*il peut changer de volonté et rayer son acceptation.*" *A fortiori*, then a third person, who has by mistake acted as Boldero has in the case before us, cannot be considered as having avoided the bill, but shall be at liberty to correct that mistake in furtherance of the rights of the parties to the bill. Rule discharged. See 1 Campb. 426. n.

4. BENTINCK V. DORRIEN. H. T. 1805. K. B. 6 East. 199; S. C. 2 Smith. Rep. 337.

And that allowing that an acceptance could not be cancelled by the acceptor before delivery of the bill to the holder, yet if the holder of the bill, the acceptance of which has been so cancelled, caused it to be voted for non-acceptance, he would afterwards be precluded from insisting that the bill was accepted.

The acceptor may be discharged by parole, but the words must amount to an absolute renunciation of the holder's claim.

Hence, a message that the holder has settled with the drawer, and that he need not give himself further trouble;

This was an action by the indorsee against the defendant, as acceptor of a bill, which had been referred, and the arbitrator, after reciting in his award that the plaintiff, on the 31st of May, left the bill with the defendants for acceptance, and they signed an acceptance thereon; but that on the first of June, before the bill was called for, they cancelled that acceptance, and that the plaintiff thereupon noted the bill for non-acceptance, declared himself to be of opinion, that by such noting the plaintiff had precluded himself from insisting that the defendants had bound themselves to pay the bill, and therefore awarded in favour of the defendants. A rule nisi was obtained for setting aside this award, on the ground that the acceptance was irrevocable. But the court held, that whether such acceptance could or could not be revoked, the plaintiff had at all events, by noting the bill for non-acceptance, precluded himself from contending that the acceptance was valid, whatever might be the case as between the drawee and other parties, who were not bound by the act of noting. Rule discharged. See 1 T. R. 182.

(1) WITH REFERENCE TO THE LIABILITY* OF THE ACCEPTOR, AND OF HIS DISCHARGE.

1. WHATLEY AND OTHERS V. TRICKER AND OTHERS. M. T. 1807. N. P. 1 Campb. 35.

Action by indorsee against acceptors of an accommodation bill of exchange. It appeared, at a meeting of the defendants' creditors, the plaintiffs had said, "they looked to the drawer, and should not come upon the acceptors;" in consequence of which defendants had assigned over their property for the benefit of their creditors. The drawer became insolvent, and the plaintiff sued the defendants. On the question whether they were discharged, Lord Ellenborough, C. J. told the jury to consider whether the renunciation was absolute or conditional—if it was absolute, defendants were clearly discharged from all liability; if, on the contrary, it was only conditional, or, in other words, that they intended only to say that they should look to the drawer in the first instance for satisfaction, then the acceptors were clearly liable.—Verdict for plaintiffs.

2. BLACK V. PEEBLE. Cited DINGWALL V. DUNSTER. M. T. 1779. K. B. 1 Doug. 248.

Black arrested Peele, as acceptor of a bill drawn by Dallas; but on finding that the acceptance was an accommodation one, his attorney took a security from Dallas, and sent word to Peele that he had settled with Dallas, and that Peele need give himself no further trouble. Dallas afterwards became bankrupt, upon which Black again sued Peele; but it was held, that as Black had, in express words, discharged Peele, the action could not be maintained.

3. WALPOLE V. PULTENEY. Cited DINGWALL V. DUNSTER. M. T. 1779. K. B. 1 Doug. 248.

Walpole held a bill accepted by Pulteney, but agreed to consider his acceptance as at an end; and wrote in his bill-book opposite the entry of this

* The acceptor is primarily liable to pay the bill according to the terms of his acceptance, and the drawer and indorsers are secondarily liable on his default; see 2 Campb. 187. n.

bill, "Mr. Pulteney's acceptance at an end." Walpole kept the bill from [378]
 1772 to 1775, without calling on Pulteney, and then brought this action. The jury found a verdict for the plaintiff; but the Court of Exchequer thought the verdict wrong, and granted a new trial, upon which the jury found for the defendant. Or an agreement to consider the acceptance as at an end;

4. MASON V. HUNT AND ANOTHER. M. T. 1779. K. B. 1 Doug. 296.

This was an action against the defendants, who were partners, as the acceptors of six bills of exchange to the amount of 3200*l.* The facts of the case were; the defendant, R. H., happening to be in the island of Dominica, on the 17th of April, 1778, wrote the following letter to his partner, T. H., in London; "As our friends V. C. and V., who were merchants in Dominica, have made purchase of about 100 hogsheads of prize tobacco, and purpose shipping them, or as many of them as they can get by this convoy, I have agreed that on their giving you orders for insurance on any part of the same, and sending bills of lading consigned to you in London; what bills of exchange they draw thereon at the rate of 80*l.* per hogshead, from 90 days to six months sight, as shall be determined, will be duly accepted and paid by you, and doubt not your punctual adherence thereto." On the 1st of May following, V. C. and V. wrote to the defendants, ordering insurance upon 40 hogsheads of tobacco, 3600*l.*, without taking notice of having drawn any bills. This letter was received on the 6th or 7th of July; and in consequence thereof T. H. got the sum mentioned insured for a premium of 303*l.* On the same 1st of May, V. C. and V. wrote another letter to T. H. apprising him that they had drawn six bills of exchange for 3200*l.* in consequence of R. H.'s letter, payable to R. V., and indorsed by him to the plaintiff, drawn on 40 hogsheads of tobacco. This letter was received on the 10th of July; on the 11th the bills arrived, and were presented for acceptance, together with R. H.'s letter of the 17th of April. T. H. refused to accept them, and after a negotiation of two or three days, a memorandum was signed by the plaintiff, which, after stating the bills, proceeded in these words; "whereas 40 hogsheads of tobacco had been consigned to Messrs. T. and R. Hunt on account of the above bills, and they being apprehensive that the net proceeds thereof may not be sufficient for that purpose, have refused to accept the said bills; we therefore accept the bill of lading of the said 40 hogsheads of tobacco, and the policy of insurance for 3600*l.* to cover the same in case of loss, being valued in the same policy at 90*l.* per hogshead, both which we now acknowledge the receipt of, and that we will apply the net proceeds when in cash, to the credit of Mr. R. V. as far as the said proceeds will go in part payment of the above bills. K. M. for self and late Co." The tobacco afterwards arriving, was received and sold by the plaintiff, and produced only about 1400*l.* Put the occasion of the difference between the sum and the valued price in R. H.'s letter did not appear. Upon the trial of the cause, it was insisted on the part of the plaintiff, that R. H.'s letter of the 17th of April was a virtual acceptance of the bills, and that nothing had happened to discharge that acceptance; that therefore the plaintiff, as the holder of the bills, was entitled to receive the difference between their amount and the amount of the price for which the tobacco was sold. But, Per Lord Mansfield, C. J. who delivered the resolution of the Court. There is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. For, if one man, in order to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange to get credit, and a third person who should advance his money upon it would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept is still but an agreement; and if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions. Here were many things specified as the conditions of this acceptance—the insurance, the bill of lading, the consignment, a certain number of hogsheads to be de-

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livered, and of a certain value to be rated by the hogsheads. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance, but the plaintiff undoes all this, and says, then I will take all from you, security, commission, &c. This was saying, "I will stand in your place, but not so as to be answerable for more than the produce of the tobacco." It is impossible that the defendants could mean to accept without any benefit or security; we are therefore of opinion, that this made an end of the agreement.

5. PARKER v. LEIGH. 1817. N. P. 2 Starkie's Rep. 228.

This was an action by indorsee of a bill of exchange against the acceptor. It appeared in evidence that defendant owed plaintiff 700*l.* on warrants of attorney, and he had observed, as to the bill in question, that he should look to the drawer for that, and that he wanted no more from the defendant than what was included in the warrants of attorney. Lord Ellenborough, C. J. held, that as the plaintiff had not expressly renounced all claim upon the acceptance it was still binding upon the defendant.—Verdict for plaintiff.

6. ELLIS v. GALINDO. M. T. 1783. K. B. 1 Doug. 249. n.

One James Galindo drew upon his brother for 30*l.* in favour of the plaintiff; when the bill became due, James paid the plaintiff 3*l.* 15*s.* 4*d.* and indorsed a promise to pay the remainder in three months on the back of the bill; after three years this action was brought against the defendant, as the acceptor. At the trial, Lord Mansfield thought the defendant discharged, and nonsuited the plaintiff. On a motion for a rule to shew cause why there should not be a new trial, Lord Mansfield said, he thought the case did not interfere with that of *Dingwall v. Dunster, ante*; but a rule to shew cause was granted. After cause was shown, Lord Mansfield said, "the doubt is, whether the question should not have been left to the jury;" and per Fuller, J. I rather think the case should have gone to the jury; but I am not, therefore, of opinion, that there ought to be a new trial; the indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and as the demand is so small, I do not think there ought to be a new trial.

7. LAXTON v. PEAT. T. T. 1809. N. P. 2 Camp. 185.

The defendant accepted a bill of exchange drawn by and for the accommodation of A., who indorsed it for value to the plaintiff, who knew the terms on which it was accepted; and who, on its becoming due, received a partial payment from A. and gave him time to discharge the remainder, but without the assent of the defendant. Lord Ellenborough, C. J. said, that as the condition of the defendant's acceptance was known to all the parties, he must be considered in the light of a mere surety for A. and as such, would clearly be discharged by time being given, without his knowledge, to A. An acceptor for the accommodation of a drawer is, in effect, *mutatis mutandis*, the drawer, and the drawer is the acceptor.—Plaintiff nonsuited. See 3 Camp. 282; 1 Taunt. 192; 4 *ibid.* 730; 5 *ibid.* 192; S. C. 1 Marsh. 14.

8. RAGGETT v. AXMORE. H. T. 1813. C. P. 4 Taunt. 730.

In an action against the acceptor of a bill of exchange, it was proved that the bill was accepted for the drawer's accommodation, and the plaintiff, the indorsee, having given time to the drawer, it was contended, on the authority of *Laxton v. Peat, supra*, that the acceptor was thereby discharged. But Mansfield, C. J. said, that however strong the presumption as to the want of consideration, which was the principle on which the case relied on was determined; the acceptor was at all times liable. See 1 Marsh. 14; S. C. 5 Taunt. 192.

9. FENTUM v. POCKOCK AND ANOTHER. M. T. 1813. C. P. 1 Marsh. 14; S. C. 5 Taunt. 192.

The defendants accepted, for the accommodation of the drawer, a bill of exchange, which was indorsed to the plaintiff for value. On presentment of the bill at the place directed for payment, it was refused, on the ground that the drawers had no effects in the defendant's hands; after this, the plaintiff be-

came aware of the circumstances under which the acceptance had been giving less en. He afterwards received from the drawer a partial payment, and took a *cognovit*, payable at a future day, without the consent of the defendants. The jury having found for the plaintiff, a rule nisi for a new trial was obtained. The plaintiff's counsel contended, that the fact of the bill being accepted for the accommodation of the drawer, and the plaintiff's subsequent knowledge of that of exchange fact, were immaterial, and did not affect the defendant's liability. He alluded to the cases of *Laxton v. Peat*, 2 Campb. 185. and *Callott v. Haigh*, 3 ibid. 281. where Lord Ellenborough held, that an acceptor for accommodation is a mere surety, as the authorities on which the defendants might rest his opposition to the present suit, and cited *Kerrison v. Cooke*, *infra*, in favour of the plaintiff's right to maintain the action, as a direct authority, Mansfield, C. J. The principle relied on in the case of *Laxton v. Peat*, that giving time to a principal will operate as a discharge to a surety, is correct as applicable to any real surety, but we cannot admit the acceptor of a bill of exchange is, under any circumstances, within that description; by the act of acceptance a party binds himself to pay the bill whenever presented, and nothing will discharge him but payment or release; as to the plaintiff's knowledge of the accommodation, that does not alter the drawee's liability.—Rule discharged. See Doug. 247; *ibid.* n.; 3 B. & P. 363; 2 *ibid.* 61.

10. *CARSTAIRS V. ROLLESTON*. E. T. 1814. C. P. 1 Marsh. 209; S. C. 5 Taunt. 551.

It appeared in this case that the defendants had made a promissory note payable to the order of A. B., who endorsed it to the bankrupts, of whom the plaintiffs were assignees. In defence, it was pleaded that the bankrupts gave to A. B. a complete release of all claims, &c. which they might have against him on account of such note. Demurrer, and joinder thereon. It was contended for the defendants, that they were relieved from liability, inasmuch as the release operated as a discharge of the action and the consideration for which the note was given. The Court were of opinion that the release to the payee could not avail the maker.—Judgment for plaintiff. See 1 Marsh. 14; S. C. 5 Taunt. 192.

11. *KERRISON V. COOKE*. H. T. 1813. C. P. 3 Campb. 362.

The defence offered to an action on a bill of exchange was, that the defendant had accepted the bill on which he was sued solely for the drawer's accommodation, and that the plaintiff, the indorsee, was aware that he had received no consideration for such acceptance; the counsel cited *Laxton v. Peate*, 2 Campb. 185. as an authority; the plaintiff proved that, on presentment for payment, the defendant had promised to discharge it. Gibbs, J. expressed doubts as to the authority of *Laxton v. Peate* as law, but said that the defendant's express promise to pay distinguished this case from that cited, as he thereby acknowledged his liability. He animadverted strongly on the inconvenience that would be occasioned by giving indulgence to the acceptors of bills for the accommodation of others.—Verdict for plaintiff. See 3 Campb. 281.

12. *ADAMS V. GREGG*. M. T. 1819. 2 Stark. Rep. 534.

This was an action on a bill of exchange by indorsee against acceptor. It appeared in evidence that the bill (which was an accommodation one), was taken up by another, with an express understanding that, if it were necessary, he should stand in the situation of the indorsee. He subsequently observed to a person, who applied to him, on behalf of the acceptor, to deliver up the bill, that the acceptor should not be troubled with it. Abbott, C. J. held, that this observation could not be deemed a discharge; and that the defendant was clearly liable.

13. *DINGWALL V. DUNSTER*. M. T. 1779. K. B. 1 Doug. 247.

Action against the acceptor of a bill of exchange. The case was as follows; Dunster lent one Wheate his acceptance, which became due the 13th of December, 1774; the payee, named in the bill, indorsed it over to the plaintiff in payment for jewels. After it became due, the plaintiff, understanding

Nor is the maker of a promissory note, discharged by a release of the payee by the indorsee.

*, if the acceptor of an accommodation bill promises payment on its presentment for that purpose, he is discharged by time being given by the holder to the drawer, without the drawee's consent.

So he is not discharged by the holder saying "he should not be troubled;"

Or by the holder's silence,

though for five years; that the acceptor never had any consideration for accepting it, and that Wheate was the real debtor, wrote to his (Wheate's) attorney in February and November, 1775, for payment, received interest upon the bill from Wheate and suffered several years to elapse without calling on Dunster. On the 13th of February, 1775, Dunster wrote to thank the plaintiff for not proceeding against him; and said he had been informed by a person that Wheate had taken up the bill, and given another to the plaintiff's satisfaction; it did not appear that the plaintiff took any notice of that letter. He afterwards sued Dunster as acceptor of the bill; and at the trial the jury found a verdict for the defendant. But upon a rule to show cause why there should not be a new trial, the Court were of opinion, that there is this difference between the acceptor and the others, that the acceptor is first liable; and, to be entitled to have recourse against him, it is not necessary to show notice given to him of non-payment by any other person. No use has been made of the defendant's letter; probably the fact did not warrant him in asserting that a person had told him Wheate had taken up the bill; had the plaintiff, by any thing in his conduct, confirmed him in such a belief, it might have altered the case. It is impossible to say silence can discharge the acceptor.

14. *ANDERSON V. CLEVELAND.* Sittings at Guildhall after E. T. 1769. 13 East 430. n.

Or continued neglect to call upon the acceptor for payment. In an action by an indorsee against the acceptor of a bill, no demand was proved till three months after the bill was due: and when the drawer had become insolvent, *Sed per Lord Mansfield.* The acceptor of a bill, or maker of a note, always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them, unless he be sure that the bill is paid by the drawer.

15. *SMITH V. CHESTER.* E. T. 1787. K. B. 1 T. R. 654.

And he is liable though the drawer's signature be forged. Per Buller, J. When a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill is forged. See 2 Stra. 946; Burr. 1354; Elac. 390; 6 Taunt. 76; and post, tit. Forgery.

16. *STEVENS V. THACKER.* T. T. 1693. K. B. N. P. Peake. 187.

But if the holder of a bill agreed not to sue the drawee, provided he will make an affidavit that the acceptance is a forgery, if the affidavit be made, though false, the acceptor is discharged. The plaintiff who was indorsee of a bill, presented it to the defendant, as acceptor, for payment. The defendant asserted that the acceptance was a forgery, and offered to make an affidavit that he never had accepted the bill. The plaintiff at first agreed not to sue him, if he would make such affidavit; but being afterwards convinced that the defendant had accepted the bill, refused to receive the affidavit, and brought the present action. The affidavit had been engrossed, but not sworn. It was urged that the plaintiff could not recede from his agreement. But Lord Kenyon said, that had the affidavit been sworn, he would have held that the defendant had discharged himself from this action, though such affidavit had been false. But not having been sworn, the defendant was still liable, unless he could prove the acceptance a forgery.—Verdict for the plaintiff.

(J) WITH REFERENCE TO THE DRAWEE'S REFUSAL TO ACCEPT, AND NOTICE THEREOF.

1st. AS CONCERNS THE RIGHT OF DRAWER TO SUE FOR CONSIDERATION.

The drawer cannot maintain an action against the drawee on a refusal to accept, unless there be a special contract to accept, but he must sue on the original consideration of the bill; see 7 T. R. 571; 7 Taunt. 312; 1 Moore. 61; 4 East. 147; Lutw. 885; 1 Stark. 2, 3. And where, by the terms of a contract of sale, payment was to be made by a bill at two months; on the vendee's refusal to accept, it was holden the vendor's remedy was by a special action on the contract for non-acceptance, and not by *indebitatus assumpsit* for the price; *Mussen v. Price*, 4 East. 147; abridged, ante, vol. ii. 423. and the cases there cited.

2nd. AS CONCERNS THE RIGHT OF THE DRAWER AND INDORSER OF A BILL TO NOTICE.

Since the course which the holder of a bill is to adopt, on non-acceptance⁴ is precisely similar to that which is to be pursued on non-payment, it will suffice to refer to the subsequent parts of the work, in which the cases on this subject are collected.

3d. As CONCERNS THE NOTING AND PROTEST FOR NON-ACCEPTANCE. See *post*, div. Non-payment.

4th. As CONCERNS THE PROTEST FOR BETTER SECURITY,

ANON. H. T. 1701. K. B. N. P. 1 *Ld. Kaym.* 742.

The custom of merchants is, that if B. upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable protests it, to have better security for the payment, and to give notice to the drawer of the absconding of B. and after time of payment is arrived, then it ought to be protested for non-payment, the same day of payment, or after it. But no protest for non-payment can be before the day that it is payable, proved by merchants, before Treby, C. J. See *post*, div. Non-payment.

If the drawee of a bill, before it has arrived [384] at maturity, absconds, the holder may protest for a better security.*

(K) WITH REFERENCE TO THE LIABILITY OF THE DRAWER AND OTHER PARTIES, ON ACCEPTANCE BEING REFUSED.

1. BRIGHT v. PURRIER. London Sittings after T. T. 1765. B. N. P. 269.

Cited in BALLIGALLS v. GLOSTER. 3 East. 483. S. P. MILFORD v. MAYOR.

H. T. 1779. K. B. 1 *Doug.* 55.

A foreign bill of exchange was drawn payable at 120 days after sight; but when the bill was presented for acceptance, that was refused, upon which an action was immediately brought against the drawer, without waiting until the expiration of the 120 days. On the trial the defendant objected that he was not liable until the expiration of the 120 days, and offered to call evidence to prove that the custom of merchants was such. But Lord Mansfield, C. J. said the law was clearly otherwise, and refused to hear the evidence.

If the drawee, on presentment for acceptance, refuse to accept, the drawer†

2. BALLINGALLS AND ANOTHER v. CLOSTER. E. T. 1803. K. B. 3 East. 481.

C. D. drew a bill on A. B., payable to defendant's order, and the latter indorsed it to the plaintiffs. A. B. refused acceptance, on which the plaintiffs immediately sued defendant, without waiting until the bill, which was drawn at 90 days' sight, would have been due. The plaintiffs had a verdict, with liberty to the defendant to move for a nonsuit. On a rule nisi accordingly, it was urged that an indorser stood in a situation different from that of a drawer; and that although a drawer might be sued immediately on non-acceptance, an indorser could not until the expiration of the time limited for the payment of the bill. But the Court was clear that the case of an indorser was not distinguishable from that of a drawer, and that every indorser was a new drawer. And Lord Ellenborough, C. J. said, that in a late case tried before him at Guildhall, it appeared to be the universally received merchant law on the continent, that an indorser was liable immediately on the non-acceptance of the drawee—Rule discharged. See *Doug.* 54; 1 *Stra.* 479; 1 *Salk.* 125; 3 *Wils.* 16; 2 *Burr.* 674.

Or indorser may be called on for immediate payment.

3. HICKLING v. HARDY. H. T. 1817. C. P. 7 *Taunt.* 312; S. C. 1 *Moore.*

61.

The purchaser of goods paid for them by a bill of exchange, which the drawee on presentment refused to accept, the vendor protested it, and sued the drawer for the goods before the bill was due, the defendant's counsel contended that the bill ought to have been returned to the drawer. The Court, however, re-

Even before the bill has been returned to the drawer.

* And if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also, in such case, protest for better security; 5 *Ves.* 574; but the acceptor is not, on account of the bankruptcy of the drawer, compellable to give this security; *Beawes.* pl. 22; the neglect to make this protest will not affect the holder's remedy against the drawer and indorser; *Beawes.* pl. 23; and its principal use appears to be, that by giving notice to the drawer and indorsers of the situation of the acceptor, by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due, and thereby prevent the loss of re-exchange, &c. occasioned by the return of the bill; *Beawes.* pl. 24.

† For upon delivery of the bill to the payee or indorsee the liability of the drawer becomes complete and absolute.

refused to entertain the point, and a rule nisi to set aside a verdict on the bill was discharged.

(L.) WITH REFERENCE TO THE EFFECT OF ACCEPTANCE, AND WHAT IT ADMITS. See also, *et c.* p. 577.

1. ROBERTSON V. KENSINGTON AND OTHERS. T. T. 1811. C. P. 4. Taunt. 39.

The drawee of a bill, by accepting it, adopts it in all terms.

Assumpsit on a bill of exchange. It appeared that the plaintiff having received from A. a bill of exchange, at 45 days after date, drawn on the defendants, indorsed it as follows: "Pay the within sum to Messrs. C. & Co. or order, upon my name appearing in the Gazette, as ensign in any regiment of the line, between the first and sixth, if within two months from this date. Robertson." It was then presented for acceptance by Messrs. C. and Co. (with whom the plaintiff had deposited the bill in order to the purchase of an ensigncy.) to the defendants, who were bankers, and who accepted it in the ordinary course. It passed through several indorsements, and ultimately to the Bank of England, who presented at the end of 45 days and obtained payment. The plaintiff's name had not appeared in the Gazette. The jury found for the plaintiff subject to the opinion of the Court. It was contended for the defendants that they were bound to accept in the terms of A's direction, that the introduction of the special indorsement by the plaintiff was an intrusion of a new term without the assent of the drawer; but the plaintiff's counsel urged that the defendant's by accepting the bill subsequently to the indorsement, had adopted it with all its circumstances; and that as the plaintiff had paid to A. the full value of the bill, he might modify it as he pleased by such indorsement and the transfer being consequently to be made only on certain conditions being performed, the bill was, till the performance of such conditions, not payable to any person than the plaintiff. The Court concurred. Judgment for the plaintiff.

2. PORTHOUSE V. PARKER AND OTHERS. M. T. 1807. K. B. N. P. 1 Camp. 82.

The ability of the drawer to make the bill; [386]

Action by payees against drawers of a bill. It purported to have been drawn by Wood, as agent for the defendants. There was no proof of Woods authority; but it was proved that the bill had been accepted by the agent of John Parker, the drawee. Lord Ellenborough, C. J. held, that the bill having been accepted by order of one of the defendants, was sufficient evidence of its having been regularly drawn.

3. WILKINSON V. LUTWIDGE. M. T. 1726. K. B. 1 Stra. 648.

And his signature, are admitted by the acceptance.

In an action against the acceptor of a bill, *Raymond, C. J.* allowed the plaintiff to read the bill without proving the drawer's hand, because he thought the acceptance a sufficient acknowledgement on the part of the defendant, but he said it would not be conclusive; and if the defendant could show the contrary the reading the bill should not preclude him.

4. CARVICK V. VICKERY. M. T. 1781. K. B. 2 Doug. 653.

But it has been doubted whether an acceptance admits the indorser's signature.

A bill payable to the order of father and son, who were not partners, was indorsed by the son only, after which it was presented, and the drawee wrote upon it a direction to his banker to pay it. In an action against the drawee, the question was whether the indorsement by the son alone was sufficient? And *Wilkes, J.* inclined to think the order to the banker was a recognition, of the indorsement; but *Abbott and Buller, Justices*, thought not.

5. HANKEY V. WILSON. T. T. 1755. K. B. Sayer. 223.

At all events it is a question for the jury.

Indorsee against acceptor of a bill. It appeared, there was no actual proof of the handwriting of one of the indorsers, whereupon the bill at the time the defendant accepted it, and that he had subsequently promised to pay the amount. Upon this evidence, *Ryder, C. J.* left the matter to the jury; They found for the plaintiff. On the question whether this evidence ought to have been left to the jury, the Court held the direction proper, observing, it is a question of fact and inference, whether the acceptance and promise did not amount to an admission that the name of the indorsee was authentic.

6. SMITH V. CHESTER. E. T. 1787. K. B. 1 T. R. 654.

In an action by the indorsee against the acceptor, it appeared that there was several indorsements on the bill at the time of acceptance; the plaintiff could not prove the handwriting of the first indorser; and it was contended that the acceptance admitted this, and it would be often impossible to prove the handwriting of foreign indorsers. Yet the Court held that the law was clearly otherwise, and that it was absolutely necessary to prove the hand of the first indorser.

7. *ROBINSON v. YARROW*. E. T. 1817. C. P. 8 Taunt. 455; S. C. 1 Moore. 150.

A. who had been a partner in a firm of B. & Co. which had been dissolved, drew on the defendant a bill of exchange, which was expressed to be drawn by A. by procuration for B. & Co. and was made payable to "our order," viz. to the order of B. & Co. A. indorsed the bill by procuration to the plaintiff; on whose presentment the defendant accepted it. No evidence of A's handwriting was offered, and the jury found for the defendant. On a rule nisi, for a new trial being obtained, it was urged for the plaintiff that the defendant as acceptor had adopted the bill in all its terms, and that therefore, as the bill was indorsed at the time of the acceptance, the indorsement must be considered to have formed part of the bill. But the Court said, that though by acceptance a drawee admits the ability of the drawer, and in a case like the present, the legal authority of the agent to draw, he does not also admit that such agent was empowered to apply, as well as receive, the effects of the drawee in the drawee's hands. Parke, J. cited the case of *Chester*, 1 T. R. 654. to show that the circumstance of an indorsement previous to acceptance would not obviate the necessity of producing such proof. Rule discharged.

And it has been since determined that the acceptance does not admit the signature of the indorser.

And al though it admits where a bill [387] is drawn by procuration the procuration as to the draw ing it does not as to the indorse ment.*

X. RELATIVE TO THE ACCEPTANCE OF A BILL *SUPRA* PROTEST.

(A) WHEN IT MAY BE MADE.

This description of acceptance is frequently made upon a foreign bill, for the purpose either of promoting the negotiation of the instrument when the drawee's credit is suspected, or to save the reputation, and prevent the prosecution, of some of the parties where the drawee either cannot be found, or is not capable of making a contract, or refuses to accept; and such acceptance is called an acceptance for the honour of the people on whose behalf it is made, and it enures to the benefit of all who become parties subsequently to that person. 1 Ld. Raym. 88; Beawes. pl. 34; 1 Lutw. 899. This security is usually given by making another subscription under the protest, that the person who becomes new security will be bound as principle for the payment of the sum mentioned in the bill upon which the protest is made; Marius. 28.

(B) BY WHOM IT MAY BE MADE †

JACKSON v. HUDSON. E. T. 1810. K. B. N. P. 2 Campb. 447.

Action on a bill drawn by the plaintiff on J. Irving, and accepted by him; and under his acceptance the defendant wrote "Accepted, Jos. Hudson, payable at, &c. The defendant was sued as acceptor. The plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless the defendant would become his surety; and that the defendant in

When the drawee with not accept, any person may accept [388]

* But upon a bill payable to *drawer's order*, an acceptance admits the drawer's ability to indorse; for if he cannot indorse, he was not of ability to draw; *Taylor v. Croker*, 4 Esp. 187. So if a bill be drawn in the name of a firm, purporting to consist of several persons, the acceptance admits there is such a firm; *Bass v. Clive*, 4 M. & S. 13.

† Any person may, without the consent of the drawer or indorser, accept the bill *supra* protest; 5 Ves. 573. The drawee, though he may not choose to accept on account of him in whose favour he is advised the bill is drawn, may nevertheless accept for the account and honour of the drawer; or in case he do not choose to accept on account of the drawer, he may accept for the honour of the indorser; in which latter case he should immediately send the protest on which he made the acceptance to the indorser; Beawes. 23. It is said that if the holder be dissatisfied with the acceptance *supra* protest, and insist on a simple acceptance, and protest the bill for want of it, the acceptor should renounce the acceptance made by him, and should insist on its being cancelled; Beawes. pl. 37.

supra protest for the

honour of
the draw
er.*

order to guarantee Irving's credit, wrote this acceptance on the bill. *Lord Ellenborough* said, that this was neither an acceptance by the drawee, nor by a person for the honour of the drawer; but that it was a collateral undertaking that the bill should be paid, and ought to have been declared upon as such.

(C) MODE OF MAKING.

The method of accepting *supra protest* is this; the acceptor must personally appear with witnesses before a notary (whether the same who protested the bill or not, is of no importance) and declare that he accepts such protested bill in honour of the drawer or indorser, &c. and that he will satisfy the same at the appointed time. and then he must subscribe the bill thus, "Accepted *supra protest* in honour of T. B. &c." *Beawes*. 458. But this acceptance *supra protest* may be so worded, that, though it be intended for the honour of the drawer, yet it may equally bind the indorser, and in such a case it must be sent to the latter. *Beawes*. 457; *Marius*. 88.

(D) LIABILITY OF PARTY MAKING.†

HOARE v. CAZENOVE, M. T. 1812. K. B. 16 East. 391.

A person
who ac
[389]
cepts for
honour, is
only liable
if the origi-
nal drawee
does not
pay.

A foreign bill was drawn on A. and B. They refused acceptance, and it was protested for non-acceptance. Defendant accepted it for the honour of the first indorsers, but did not pay. This action was thereupon brought. Defence, that it had not been presented for payment when due to A. and B. nor protested for non-payment by them. A verdict was found for plaintiff, subject to the opinion of the Court. The facts now came before them. *Per Cur.* The question before us depends upon the nature and obligation of an acceptance for the honour of the drawer, and indorsee. If an acceptance, in these terms be an engagement, by the person giving it, that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any other person, the plaintiff is in that case entitled to recover; but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, that is, an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonouring the bill, and such dishonour by him should be notified by protest to the person who has accepted for the honour of the indorser, then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much considerations, we are of opinion is the case.—*Postea* to the defendant. See 1 *Lutw*. 896; *Pothier on Bills of exchange*, partie, 1. cap. 4; *Des Avals*. *Pothier*, part. 1. cap. 5. s. 131; *Malyne*. p. 273; *Beawes*. *Lex Merc*. p. 421. s. 43.

(E) RIGHTS OF PARTY MAKING.

A person accepting a bill *supra protest*, either for the honour of a drawer or of an indorser, although without his order or knowledge, has his remedy against such person who must indemnify him from any damage he may have sustained, the same as if he had acted entirely by his direction; *Beawes*. pl. 47; 1 *T. R.* 263. He who accepts a bill in honour of the drawer only, has no remedy against any of the indorsers, because he accepts merely on the

* Or of any particular indorser; *Beawes*. 38; and even a bill previously accepted *supra protest*, may be accepted by another person *supra protest*, in honour of some particular person; *ibid*. 42. No one, however, should accept a bill under protest for non-acceptance for the honour of the drawer, before he has ascertained from the drawee his reason for suffering the bill to be protested; but if the acceptance be in honour of the indorser, such inquiry is unnecessary; *ibid*.

It is said that the holder of a bill must receive an acceptance *supra protest*, if offered by a responsible person, it being of no importance to him, whether it be accepted simply or under a protest, as the acceptor pays the charges, unless he had orders from the remitter not to admit of such an acceptance. But this opinion seems to be erroneous, for it has been adjudged that the holder need not acquiesce in any case; *Mitford v. Walcot*, 12 *Mod*. 410; *Beawes*. pl. 57.

† An acceptance *supra protest* is as obligatory on the acceptor as if no protest had intervened, it being immaterial to the holder of a bill on whose account it is accepted; *Beawes*. 35; 1 *Ld. Raym*. 575; 12 *Mod*. 410; *Bnrr*. 1672. If the acceptance were for the honour of the bill or of the drawer, the acceptor is liable to all the indorsees as well as the holder; if in honour of a particular indorser, then to all subsequent indorsees.

behalf of the drawer; but the acceptor for the honour of the drawer of a bill already accepted by the drawee, but protested by the holder for better security, may, when he has paid the bill, sue the drawer or drawee, though in the case of a bankruptcy of these parties, if the first acceptance were for the accommodation of the drawer, a court of equity will compel the acceptor, *supra protest*, first to resort to the drawer's estate; 5 Ves. 574. An acceptor for the honour of an indorser has no claim upon any party to the bill, subsequent to him for whose honour he accepted, and all the prior parties, the drawer included, are bound to make satisfaction to such acceptor; Peawes, 49. 35. 44; Poth. pl. 113; Molloy. b. 2. c. 10. s. 24.

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XI. RELATIVE TO THE TRANSFER* OR NEGOCIATION OF A BILL OR NOTE, AND OF THE PARTIES IN WHOM THE RIGHT OF TRANSFER IS VESTED.

(A) WITH REFERENCE TO THE FORM OF THE INSTRUMENT. (See also tit. Check East India Certificates; and Exchequer Bills.

(a) *Where words of transfer are inserted; see ante, p. 273.*

HILL N. LEWIS. H. T. 1707. K. B. 1 Salk. 131; S. C. by the name of LEE v. LEWIS. 1 Lord Raym. 743.

Moor drew a note payable to the defendant or his order, and another payable to him generally, without any words to make it assignable; the defendant indorsed them to Zouch, and Zouch to the plaintiff. It was urged that the second note was not assignable because the words *or his order* were omitted. And Holt, C. J. agreed that the indorsement of the note did not make him that drew the bill chargeable to the indorsee; for the words *or to his order* give authority to assign it by indorsement, and amount to an agreement by the drawer that he would be answerable to the assignee.

(b) *Where words of transfer are omitted.*

1. HILL v. LEWIS. H. T. 1707. K. B. 1 Salk. 132. abridged *ante*.

On an exception because this bill had not words of transfer. Holt, C. J. said the indorsement of a bill which has not the words *or to his order* is good and of the same effect between the indorser and indorsee, and therefore makes the former chargeable, but gives no right of action against the other antecedent parties to the indorsee. See *ante*, 273.

2. SMALLWOOD v. VERNON. M. T. 1722. K. B. 1 Stra. 478.

The Court in this case said, every act of indorsing a bill was equivalent to a new drawing.

(c) *Where the instrument is payable to bearer.*

HINTON'S CASE. M. T. 1682. K. B. 2 Show. 235. S. P. GRANT v. VAUGHAN. T. T. 1764. K. B. 3 Burr. 1516; S. C. 1 Blac. 485.

Action on a bill against the drawer, payable to J. S. or to the bearer, the plaintiff sued as *bearer*. And Pemberton, C. J. said, he may sue, but must prove a valuable consideration, for if he came to be bearer by casualty or knavery, he shall not have the benefit of it. *Fut see Horton v. Coggs*, 3 Lev. 299; *Hodges v. Steward*. 1 Lord Raym. 180.

(B) WITH REFERENCE TO THE PERSONS WHO MAY TRANSFER.

(a) *Agents.*

1. ANON. M. T. 1701. K. B. 12 Mod. 564.

In this case it was resolved, that if a man has a bill of exchange, he may authorise another to indorse his name upon it by parol; and when that is done it is the same as if he had indorsed it himself. See post, tit. Principal and Agent; and *ante*, p. 314.

* As to the mode by which the transfer is to be effected it is the province of the Court to determine; *Edie v. the East India Company*, 2 Burr. 1524. abridged post, and not that of a jury, unless in new cases where the law of merchant is doubtful, when evidence of the custom may be received; *Stone v. Rawlinson*, Willes. 561. abridged post, to show or negative the transferable nature of the instrument.

† But when omitted by mistake, they may be supplied; *Kershaw v. Cox*, 3 Esp. 246. abridged *ante*, 251.

The insertion of words of transfer, gives the indorsee a right of action against all antecedent parties.

If words of transfer are omitted, the indorsee cannot sue any of the parties except his immediate indorser.† He may sue him, because the act of indorsing is a new drawing.

[391] Bills payable to bearer are negotiable from hand to hand *ad infinitum*.

An agent may indorse under a parol authority, and bind his principal.

And if he indorse in unqualified terms, he will be personally responsible.

2. *GOUFFY v. HARDEN*. M. T. 1816 C. P. 2 Marsh. 454; S. C. 7 Taunt. 159; S. C. Holt N. P. C. 342.

It appeared in an action on a bill of exchange that the plaintiffs residing in Paris had desired the defendants, their agents in London, to procure for them certain bills of exchange, on which the defendants purchased the bills in question, payable to their own order, and drawn by A. of London, on B. of Lisbon, and having indorsed them, remitted them to the plaintiff, who indorsed them to C. and Co. merchants in Italy, by whom they were negotiated. They were afterwards presented for acceptance to B. and being dishonoured and protested, D. and Co. for the honour of C. and Co. accepted them; and on their being presented for payment and dishonoured, D. and Co. paid them, likewise for the honour of C. and Co.; whereon the plaintiffs paid the amount to D. and Co. and brought this action on the defendants' liability as indorsers. On the trial it was proved that it was the frequent practice of agents, unless confidence existed between the parties, to add to their indorsement of bills, the words "*sans recours*;" and it was contended for the defendants that they had acted only as agents for the plaintiffs in the purchase of the bills, and that their liability as such was rebutted by the fact that they had taken only the usual commission. The jury found for the plaintiffs; and on a rule nisi for a new trial, Gibbs, C. J. said, that whether or not the defendants considered themselves as agents on the purchase of the bills, it was not shown that the plaintiffs looked upon their indorsement in that light; and he was of opinion that as they had indorsed the bills in general terms without any qualification, they were liable.—Rule discharged.

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Though an agent acting under a power of attorney to receive debts, &c. coupled with a direction, in a letter remitting certain bills, to dispose of the proceeds "when cashed, can not indorse the bills.

3. *MURRAY v. THE EAST INDIA COMPANY*. M. T. 1821. K. B. 5 R. & A. 204.

A power of attorney was given to A. B. authorising him, as agent for C. D. to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, dues, whatsoever; and to give sufficient discharges. He received from C. D. certain bills of exchange in a letter which contained these words, "My old friend, you will find inclosed bills as follows, which, when cashed, I would recommend your being particularly careful of." A. B. afterwards indorsed the bills. His power to do so was now questioned by the acceptors. It was admitted, that indorsing the bills was one mode of getting them cashed; but the Court held that A. B. had no power to indorse them.

4. *HAY v. GOLDSMID*. M. T. 1804. K. B. 2 Smith. Rep. 79.

This was an action of trover for certain bills of exchange against the indorsees. A. B. appointed C. D. and E. F. his agents, under a power of attorney, to demand, sue for, and receive all money or sums of money, due or to become due to him, *on any account whatsoever*, and for non-payment thereof to take and use all lawful means for the recovery thereof, (pursuing the usual words of such powers) and to transact all business. A bill of exchange was afterwards received by them, and indorsed by them by procuration for A. B. C. D. and E. F. became bankrupt, and a commission was issued. A. B. then disavowed the indorsement. A verdict was found for the plaintiffs, who were the executors of A. B. with liberty for the defendant to move for a nonsuit to be entered. A rule nisi having been obtained, it was urged in support of it that the extensive words of the power which had been delegated to C. D. and E. F. "to transact all business," must include every thing; and it was urged that if the power was only to receive money, these latter words would be nugatory, since in fact there could be no other business to do. *Per Cur.* It comes merely to the question whether this is to be construed as a general power to do all business whatsoever for A. B. or whether it is not to be understood with reference to the preceding subject matter of the power. Now when any one substitutes other persons to act for him, the largest words are to be construed with reference to the subject matter. It must be understood as if he said, I give a power of attorney to act for me in these terms, mentioning the power to receive the money, and to transact all business incident and appertaining to that business, for which he is appointed, namely, to the receiving

And the power of attorney authorising the agent "to do all other business," will make no difference.

of money, that this clause may be necessary to empower them to receive a composition, or to give delay of payment. But without saying what it authorises them to do in particular, it only authorises them to do something in the nature of or relating to the payment or receipt of moneys. It cannot extend to all business whatsoever; for in that case it might give them a power to let lands, and to turn the tenants out upon notice. It cannot therefore be said to have enabled them to indorse the bills in question.—Rule discharged.

5. *LEE v. ZAGURY*. M. T. 1817. C. P. 1 Moore. 556; S. C. 8 Taunt. 114. [393]

In *assumpsit* on a bill of exchange, it appeared that the defendant being indebted to A. procured at the request of the latter, the acceptance of B. to a bill drawn by himself, and indorsed it to A. on an understanding that A. should produce funds to answer it when due. A. accordingly took it up when due, though, after protest for non-payment. A. struck out his own indorsement, and placed it in the hands of C. in order to have it remitted to Marseilles for the purpose of procuring payment from the defendant, who resided there. C. sent the bill for the above purpose to D. at Marseilles, who indorsed when overdue, and paid it *bona fide* to E. in discharge of a debt. E. having demanded payment, and threatened an arrest, the defendant drew the bill in question and delivered it in payment of the first bill; and E. indorsed it to the plaintiffs. On the maturity of the latter bill, A. gave notice to the defendant not to pay it. It appeared from the answer of the plaintiffs to a bill filed against them in the Exchequer, that they were only agents for E. and had given no consideration for the bill, and that E. was debited with the amount of the bill, on its being dishonoured when due. The jury found for the defendants, on the ground that the property in the bill was in A. and that he had therefore a right to direct the defendant not to pay it; and that the plaintiffs were only agents for E. On a rule *nisi* for a new trial, Dallas, J. said, with respect to the plaintiffs' claim, they were merely agents for E. and consequently could have no better interest than their principal. We have seen that the indorsement to E. was fraudulent on the part of D. E. therefore could not derive any title but that of trustee to property, in which A. was the party beneficially interested. And were we to allow the plaintiffs a general verdict as indorsees, it would only be to subject them to an action for money had and received.—Rule discharged.

6. *TRUETTEL v. BARRANDON*. M. T. 1817. C. P. 1 Moore. 543; S. C. 8 Taunt. 100.

In *trover* for bills of exchange It appeared that certain bills of exchange were indorsed to A. B. or order "for account of Messrs. Truettell & Co." A. B. was employed by Messrs. T. & Co., the plaintiffs, as agents; and having an open account with the defendants, placed the bills in their hands as security for certain advances of cash made to him on his own account, by the latter, but without the authority or knowledge of the plaintiffs. The deposit being made in the nature of a security, no discount was taken. The counsel for the defendants relied on the negociable nature of bills of exchange, and adduced the case of *Collins v. Martin*, *abr. ante*, vol. iii. p. 381. in which bills indorsed in blank were deposited with a banker, who gave them to another banker on his own account, and the defendant had a verdict, on the ground of the negotiable nature of the bills. But Dallas, J. delivered his decided opinion, that the case cited did not apply, as, in the present case, the terms of the indorsement were sufficiently restrictive to make it evident to the defendants that the bills belonged to the plaintiffs, and thereby to destroy their negotiability. A rule *nisi* to set aside a verdict which had been obtained by the plaintiffs was therefore discharged. See *ante*, vol. iii. tit. Banker

(b) *Alien*. See *ante*, p. 217. (c) *Assignees*.

GUNSON v. METZ. H. T. 1823. K. B. 1 B. & C. 193; S. C. 2 D. & R. 334.

Declaration in *assumpsit* on a bill of exchange, dated 18th Sept. 1816. for 160l., payable 12 months after date, drawn by the defendant, accepted by A. B., and indorsed to C. D., and by him indorsed to the plaintiffs, as assignees of the effects of E. F., a bankrupt. Then followed the common counts for money due to the plaintiffs as such assignees. An objection was made at the trial

gnees* of a bankrupt, and they sue upon it as assignees, they need not prove the validity of the commission of bankruptcy.

on the behalf of the defendant, that the plaintiffs had not proved the legality of the commission of bankruptcy; to which it was answered, that the action was not brought for a debt due from the defendant to the bankrupt, *before* his bankruptcy, but for a debt due to the *plaintiffs as holders* of this bill, long *after* the bankruptcy. The jury found a verdict for the plaintiffs. A motion was now made for a rule *nisi* to set aside that verdict, and to have a nonsuit entered, or new trial granted. The same objection was urged as was made at the trial.

Per Cur. A party to whom a bill is indorsed is not bound to sue in the character in which he acted at the time it was delivered to him. An executor, to whom a bill has been indorsed, may sue in his individual character, and therefore, the part of the declaration in which the plaintiffs are said to sue *as assignees* is mere surplusage, and might be struck out, and consequently there was not any necessity to prove the validity of the commission of bankruptcy.

(d) *Bankers.*

BRUCE AND OTHERS V. HURLY. E. T. 1815. N. P. 1 Star. 23.

Assumpsit by the indorsees of a promissory note against the makers. It appeared, A. & Co., bankers at Tauton, sent to plaintiffs, their bankers in London, a note of defendant. The day before it became due, the plaintiffs sent it to A. & Co., that they might obtain payment from defendant. Defendant did not pay it; and whilst the bill was in their hands A. and Co. became bankrupts. A. and Co. had overdrawn plaintiffs, and plaintiffs sued defendant on this note; and as plaintiffs only sent the note to A. and Co. that they might obtain payment for plaintiffs, and act as their agent in that transaction, Lord Ellenborough, C. J. held that the plaintiffs were entitled to recover.

See ante, vol. iii. p. 764.

(e) *Bankrupts.* See post, tit. Partners.

1. SMITH V. PICKERING. E. T. 1791. K. B. N. P. Peake. 50.

A. B. and C. D. drew a bill on the defendant payable to their own order, which the defendant accepted. The drawers delivered this bill to the plaintiff for a valuable consideration, but forgot to indorse it; but afterwards became bankrupts, and then indorsed it. The plaintiffs, as indorsees, now sued the defendant as acceptor, and Lord Kenyon, C. J. held the indorsement as valid.

2. ARDEN V. WATKINS. H. T. 1803. K. B. 3 East. 317.

On the 5th of October A. B. committed an act of bankruptcy, on which a commission issued on the 31st of December, 1801. On the 4th of December, 1801, he drew a bill on the defendant for 100*l.* payable to his own order, and indorsed it to the plaintiff, who paid him the full value. Defendant owed A. B. nothing, but accepted the bill, to enable him to raise money on it, and A. B. deposited a lease with him as an indemnity. The assignees insisted upon a restoration of the lease, and defendant refused to pay the bill. Action upon the bill, and reference. The arbitrator awarded against defendant, but stated the facts specifically, to enable him to take the opinion of the court. After a rule *nisi* to set aside the award, cause shown, and time taken to consid-

* If a man holds a bill or note not in his own right, but as a trustee, his bankruptcy will not pass the right to transfer to his assignees; Ramsbottom v. Cater, 1 Stark. 228. And if a trader get a bill by fraud, and become bankrupt, the bill will belong not to his assignees, but to the person from whom he obtained it; Gladstone v. Hadwen, 1 M. & S. 517. abridged *ante*, vol. iii. p. 396. 779.

† Where A. placed bills, indorsed in blank, in the hands of his bankers who, pledged them for advances made by B., and became bankrupt, it was holden that A. could not recover from B, the pawnee, unless it appeared that no value was given for them; Collins v. Martin, 1 B. & P. 648. abridged *ante*, vol. ii. p. 381. And even where A. deposited with B. his banker, a bill for a particular purpose, which is indorsed so as to give him the right to transfer it, and he negotiates it, such negotiation, though a breach of duty, will not divest the indorsee from retaining the bill against A.; Bolton v. Puller, 1 B. & P. 539. abridged *ante*, vol. iii. p. 778.

‡ So where a person made a note payable to an uncertificated bankrupt or order, the bankrupt indorsed it, and it came into the hands of an innocent holder, the assignees did not interfere, but the holder brought an action against the maker, who pleaded the bankruptcy of the payee, but the Court held the plea bad; Drayton v. Dale, 2 B. & C. 293; S. C. 3 D. & R. 534. abridged *ante*. vol. iii. p. 920.

If a bankrupt who has a lien on a note, deliver it to his customer to procure [395] payment, and the customer becomes bankrupt, the note will belong to the banker.

A bankrupt may indorse a bill or note, in which he has before the bankruptcy parted with his beneficial interest. ‡

So if a bankrupt draw a bill payable to his own order, having at the time no effects in the hands of the drawee, his indorsement

er, the Court said, for the defendant it has been argued that the property in the bill passed to his assignees, who take whatever property he may have that is not trust property, which this bill is alleged not to have been; that the deposit of the lease was a consideration for the bill, and that the transaction is the same as if the plaintiff had placed in the defendant's hands 150*l.* of the money, of his assignees, on his undertaking to pay that sum to his (A. B.'s) order; and as such order could give no authority to the plaintiff to receive the money of the assignees, he cannot recover. With this reasoning and statement we do not agree. The case is no more than this. the defendant, in consideration of a security which the assignees of a bankrupt could make void, accepts the bill in question; the assignees do not avoid the security; the consequence is that it becomes an acceptance without consideration; an acceptance in which, as the bankrupt could not sue on it, his assignees have no interest; and the defendant cannot resist this demand, on the ground that the plaintiff has no title; and the want of consideration furnishes no defence to one who has advanced money on the credit of the acceptor. The arbitrator has judged correctly, and the rule must be discharged.—Rule discharged. See 2 Esp. 611; Peake's N. P. C. 140.

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3. WILLIS V. FREEMAN. T. T. 1810. K. B. 12 East. 656.

In an action by the indorsee of a bill against the acceptors, a verdict was found for the plaintiff, subject to the opinion of the Court upon a special case: The case stated that A. B., the drawer, being indebted to the plaintiff more than 2000*l.* and being insolvent, proposed to pay the plaintiff a composition of 13*s.* 6*d.* in the pound together with the costs of an action which had been brought by the plaintiff against him, by a bill upon the defendant. This proposal being acceded to, A. B. applied to the defendant to accept a bill for 1400*l.* for his accommodation. The defendant accepted the bill, drawn on the 5th of July, and payable on the 10th of November, 1809, having in his hands effects of A. B.'s to the amount of 888*l.* 16*s.* 8*d.* A. B. had committed a secret act of bankruptcy on the 7th of March, 1809, upon which a commission issued upon the 25th of July. *Per Cur.* It is clear that, except in cases provided for by particular statutes, a trader, after an act of bankruptcy which is followed up by a commission, loses all power or control over his property, and can make no transfer of it, so as to prejudice his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy will be operative. The question for our consideration therefore is, whether this indorsement by A. B., if allowed to be effectual, can prejudice his assignees. Now it is clear that had A. B. had no funds to have met the payment of the bill, and it had been a complete accommodation acceptance, the assignees could not have been injured at all by the plaintiff's suing on the bill, because, as A. B. himself could have had no right upon such bill against the acceptor, his assignees, who can in this respect stand in no better situation than the bankrupt whom they represent, could have had no right upon it, supposing it had remained in his possession; and therefore his indorsement would work no prejudice to him. It is contended, however, in the case before us, 1st, that where the acceptance is partly for value, and in part only by way of accommodation, the assignees have an interest in the bill, and a right *pro tanto* to sue upon it, and that, to allow the indorsement to operate upon the surplus, would prejudice their right, and would be subjecting the acceptor to two actions upon the same acceptance, which is not allowable; and, 2dly, that since the stat. 49 Geo. 3. c. 121. s. 8. if the defendant were compelled to pay the amount of the bill, after deducting what portion of it belonged to the assignees, he, the defendant, as a surety for a bankrupt, paying under the circumstances stated in the 8th section, would be entitled to prove his demand in respect of it under A. B.'s commission, and the assignees and other creditors would receive a prejudice from that proof. But as to the first objection, we think that the assignees had no right to the bill in opposition to the plaintiff, nor any right to sue upon it for the 888*l.* 16*s.* 8*d.* They are entitled to say that the 888*l.* 8*s.* 8*d.* shall not be touched. They

So a bankrupt's indorsement and transfer of a bill accepted in part for his accommodation, will confer a title upon the indorsee to sue for so much as was an accommodation.

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may resist and disaffirm any operation of this bill to transfer that sum to their prejudice, but they have no further right, nor can they arbitrarily interfere with or vary the rights of others. Before this bill was drawn, and independently of it, this 888l 16s. 8d. was theirs: the acceptance of this bill gave them no first right—it merely left the old one as it was. This is not the case of a professed indorsement of a part of the bill, which would have the effect of giving several actions on the bill; but it is an indorsement of the whole, supposed at the time to be valid for the whole, but which from subsequent events, the defendant is at liberty to resist and vacate for a part and upon payment of which part he is discharged from all *further responsibility upon the bill*, though he still continue answerable for the residue of its amount to others in another form, and upon a ground wholly independent of the bill. Then, as to the second point, it is evident that the *quantum* of proof against the estate will not be varied by the defendant's proving (if he should be admitted to prove.) If this sum be recovered from the defendant by the present plaintiff (the former we will assume competent to prove for it,) in that way it is proved by the defendant; and if the plaintiff do not recover it, he, the plaintiff, may certainly prove it himself, and therefore it will be once proveable either by the one party or the other. Upon the whole, therefore, as by the acceptance of the defendant induced A. B. to suppose that he was receiving a valid engagement from the defendant for 1400l.—and as it would be unjust to allow the defendant to withdraw himself from the *whole* engagement, because it would interfere with the rights of assignees unless they were relieved from a part of it; as the assignees will have every thing to which they are entitled independently of this bill; and that, whether the plaintiff recover upon it to the extent which we have now decided he can do, or not, it appears to us that a verdict must be entered for the plaintiff *pro tanto*. See 7 T. R. 711; 3 East. 317.

(f) *Corporations*. See *ante*, p. 118. (g) *Executors and administrators*.
 STONE v. RAWLINSON. E. T. 1745. C. P. Willes. 559; S. C. Barnes. 164;
 S. C. affirmed 3 Wils. 1. and 2 Stra. 1260,

The right to transfer a bill or note is vested in the executor or administrator* on the death of the holder, and his indorsee need not make a profert in curiam of the letters of administration.

This was an action on a promissory note for 50 guineas made by the defendants, dated the 11th of May, 1730, and payable to James Watson, or order. The declaration stated, that Watson died on the 1st. of April, 1734, intestate, upon whose death administration of his goods and chattels was granted to Ann Webb, who indorsed the note to the plaintiff. To this declaration defendants demurred, and showed for cause that the plaintiff did not bring into the court, or show to the Court any letters of administration of J. Watson's goods granted to Ann, and that he did not show who granted administration of Watson's effects to the said Ann. The Court said, there are three points; 1st, that there is no profert made of the letters of administration; 2dly, that it [398] is not said by whom the letters of administration were granted by proper authority; and a third was made at the bar, that an executor or administrator cannot assign a promissory note made payable to a person or order, so as to enable the indorsee to bring an action on such note, in his own name, by the statute, 3 & 4 Anne, c. 9. As to the two first objections, which are the only causes assigned in the demurrer, we have given our opinion before; for as the letters of administration cannot be supposed to be in the custody or power of the indorsee, he ought not to be obliged to produce them; and, for the same reason, he need not show by whom they were granted; but if the defendant stand trial, the plaintiff must not only produce the letters of administration in evidence, because it is the title under which he claims, but must likewise show whether they were granted by a Court, or a person having legal authority so to do, otherwise he cannot recover. The third point, therefore, and the only one which remains to be considered, is, whether the executor or administrator of a person to whom, or to whose order a promissory note is made payable can assign over such note, so as to enable the indorsee to bring an action upon it in his own name. As this is a matter which greatly concerns the trade and

* But if he indorse without qualification he will be personally liable; King v. Thom, 1 T. R. 587. abridged *ante*, 321.

commerce of the nation, and as it has never been judiciously determined before. we thought ourselves at liberty, and that it was the properest method we could take, to inquire of traders and merchants, of undoubted credit, what has been the practice in this case ever since the act of the 3 & 4 of Queen Anne, and how the act has been understood by them. We have done so; and they all agree that it has been the constant practice for executors and administrators to indorse such notes and inland bills of exchange; and that promissory notes, when so assigned, have always been considered to be as much within the statute, and that they may be put in suit by the indorsee in the same manner, as if they had been indorsed by the testator or intestate. As, therefore, we are fully satisfied that this has been the constant practice, and that the law has been always so understood amongst traders, and as the courts of law have always, in mercantile affairs, endeavoured to adapt the rules of law to the course and method of trade, in order to promote trade and commerce instead of doing it any hurt, so we are determined, in the present case, to make this indorsement valid, according to the practice, if we can by any means make it consistent with the words of the act, and agreeable to the rules of law; and we think it is easy to do both. The words of the act, when considered, will, I think, plainly warrant it—I mean the following words, in the first section of the act: “That any person to whom a promissory note, that is payable to any person or his order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money, either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange.” What was the practice before and since as to inland bills of exchange, we can only learn from the report of merchants; and they unanimously agree, that they were always looked upon to be so assignable by executors and administrators as to enable the assignee to bring an action in his own name; and we think this construction agreeable to the plain intent of the act, which is, that whereas the assignee of such notes before had certainly an equitable interest, which would enable him to bring an action in the name of the assignor, such equitable interest by the statute was converted into a legal interest, so as to enable the assignee to bring an action in his own name. It must be admitted, that the whole interest to the testator, or intestate, in such notes, vests in the executor or administrator; and that, before the statute; the executor or administrator might have assigned all his right in such notes, as to convey an equitable interest to another, and to enable him to sue in the name of the executor or administrator. If therefore, by the statute, such equitable interest is converted into a legal one, it follows, that since the statute such assignee may sue in his own name; and we think, that the case of *Moore v. Manning*, 6 Geo. 1. in this court, and reported in *Comyns*. 311. & 312., which was the only case that was cited which seems to bear any resemblance to this, plainly warrants this construction. A promissory note drawn by Manning was made payable to Statham, or his order; Statham assigned it to A., and A. to plaintiff. On a demurrer to the declaration the exception was, that the assignment was only to A., not saying to him or order, and therefore he could not assign it to the plaintiff. And to this the Chief Justice at first inclined; but afterwards it was resolved by the whole Court that it was good; for if the original note were assignable, it will always remain so, and whoever has the whole interest in the note may assign it as he pleases; whoever has the absolute property in a bill, made payable to one or his order, may assign it as he pleases, within the provision of the statute, and such assignee may maintain an action in his name. The executor and administrator of a person to whom such bill is made payable, has the absolute property in it, and therefore he may assign it to whomsoever he pleases; and such assignee may maintain an action in his own name, which is the only question that remains to be determined in the present case.—Judgment for plaintiff.—See ante, p. 320.

(A) *Finders*. See post, div. Transfer by Delivery, p. 413; and div. On lost Bills.

The *bona fide* indorsee of a bill cannot be affected by the fact of the instrument having been obtained by the creditor of an insolvent [400] whilst under arrest, and who was subsequently discharged under the act.

(i) *Infants.* See ante, p. 322.

If a bill be payable to an infant, an indorsement by him will not convey any right as against himself; Taylor v. Croker, 4 Esp. 187. abridged ante, p. 323

(j) *Insolvents.*

SMITHSON v. POGSON. M. T. 1823. K. B. 3 D. & R. 567.

The creditor of an insolvent debtor, who had petitioned to be discharged under the insolvent act, obtained from his debtor, whilst in prison, a bill of exchange for his debt, and indorsed it to an innocent holder for valuable consideration. The debtor was afterwards discharged under the insolvent act. The question now came before the Court, whether it was an available security. It was contended that it was a fraud upon the other creditors and therefore void, and that the case of Jackson v. Davison (4 B. & A. 694.) was decisive on the point. *Sed per cur.* In that case the action was brought by the creditor himself, to whom the fraudulent preference had been given; here the right and interest of a third person has intervened, and he is found by the case to be an innocent and *bona fide* indorsee.—*Postea* the plaintiff's. See 2 Campb. pl. 443; post. tit. Insolvent Debtor.

(k) *Married women.*

CONNOR v. MARTIN. E. T. 1722. K. B. 1 Stra. 516; S. C. cited 3 Wils. 5

A *feme covert* can not indorse a bill of exchange.*

The plaintiff declared upon a note made to *feme covert*, and indorsed by her to him. After argument, judgment was given for the defendant, the right being, in point of law, vested in the husband, and the wife having no power to dispose of it. See ante, p. 75. and 324.

(l) *Partners.* See post, tit. Partners.

The indorsement of a bill or note by one of several partners in the partner's name though without the consent or knowledge, and in fraud of the others, will be binding on the partnership, as between them and an innocent holder.

SWAN v. STEELE. H. T. 1806. K. B. 7 East 210; S. C. 3 Smith. Rep. 199.

A., B., and C. traded under the firm of A. and B. in the cotton business, C. not being known to the world as a partner; and A. and B. traded as partners alone under the same firm in the business of grocers, in which latter business they became indebted to D., and gave him their acceptance, which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of A. and B. a bill of exchange to D., which they had received in the cotton business, in which C. was interested, but such indorsement was unknown to C., of whom D., the indorsee, had no knowledge at the time. A. and B. afterwards became bankrupts, and B. being dead, this action by D. as indorsee of the bill, was brought against A. and C., and on a case reserved, the only question was, whether the indorsement was good. For the defendants it was contended that the plaintiff must have known of the partnership, and that A. and B. were misapplying the bill. *Per Cur.* We think that the knowledge which is argued for in the plaintiff's will not vitiate a transfer actually made to them, without cognizance of the facts previous. This bill, which was indorsed by the two, was the property of the three partners. By the indorsement they had a right to make that transfer; and the plaintiff would incur a loss now if it were set aside, because they could not have that other security which they would have obtained before. But the discovery of the misconduct of one or two of these partners cannot vitiate a transaction, which vested a regular interest. The right to the bill passing by indorsement, cannot now be invested by the subsequent knowledge that it is against the will of the third partners.—Judgment for plaintiffs. See 1 East. 43.

(m) *Persons of same names as payee.*

MEAD v. YOUNG. M. T. 1790. K. B. 4 T. R. 28.

[401] A person of the same name as the payee of a bill obtaining possession of it, without title, and indorsing his name there

Action brought by the indorsee of a bill of exchange payable to H. Davies, or order, against the acceptor. It came into the hands of another H. Davies, who indorsed, and the plaintiff, without any imputation of fraud, discounted it. On the defendant offering to prove that the H. Davies who indorsed the bill was not the person in whose favour the bill was drawn, Lord Kenyon, C. J. was of opinion, that the evidence was inadmissible, and the plaintiff obtained a verdict. And on motion for a new trial, Lord Kenyon retained his former

* Unless it be as agent to her husband; Coles v. Davis, abridged ante, 1 Campb. 483.

mer opinion. But Ashurst, Buller, and Grose, Justices, held, that unless the on, is guil
indorsement was made by the person to whom the bill was really payable, it ty of forge
was a forgery, and could confer no title; and that therefore it was competent ry, and
for the defendant to show that the person who indorsed the bill, was not the therefore a
person in whose favour it was made. The rule for the new trial was made *bona fide*
absolute. See *Miller v. Race*, 1 Burr. 452. indorses
cannot re
cover
through
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dorment
against the
acceptor.

(n) *Several persons not in partnership.*

1. *CARVICK v. VICKERY*. H. T. 1781. K. B. 2 Doug. 653.

A bill was drawn by father and son, who were not partners, payable to their such in
own order. The son alone indorsed it; and upon an action by his indorsee dorment
against acceptor, Lord Mansfield thought an indorsement by both parties es- acceptor.
sential, and nonsuited the plaintiff. A new trial, however, was afterwards
granted. The Court, after time taken to consider, being of opinion that by A bill pay
making the bill payable to their own order the father and son had made them- able to se
selves partners as to this transaction, granted a new trial; but upon the se- veral per-
son second trial, Lord Mansfield said he did not think the question so decided as to sons not
partners,
must be in
standing of all the bankers and merchants in London, the indorsement was dorment by
all of them.
bad, as not being signed by both the payees; and the jury, *una voce*, declared
that that was the usage and understanding; and without hearing any evidence
upon the point, they found a verdict for the defendant.

2. *JONES AND ANOTHER v. RADFORD*. K. B. Sittings after H. T. 1806. N. P. But where
it was only
indorsed by
one, and
drawee ac-
cepted after
such in-
dorment,
it was hol-
den he
could not
dispute its
validity.
[402]

Assumpsit by the indorsee against the acceptor of a bill of exchange, paya-
ble to A. and B., indorsed by A. for himself and B., and afterwards accepted
by the defendant. Defence, that A. and B. were not partners; and that con-
sequently it should have been indorsed by both; but Lord Ellenborough said,
that the defendant having accepted the bill after such indorsement, could not
dispute its regularity.

(o) *Trustee.*

EVANS v. CRAMINGTON. T. T. 1637. K. B. Carth. 5; S. C. 2 Vent. 307; S. C. Skin. 264.

A bill was payable to "Price or order, for the use of Calvert." Price in-
dorsed it to Evans, after which an extent issued against Calvert, and the
money due upon it was seized to the use of the king. These facts appearing
upon the pleadings, two points were made upon demurrer; the one, whether
Calvert had such an interest in the money as might be extended; and the oth-
er, whether Price had power to indorse the bill, or whether he had only a bare
authority to receive the money for the use of Calvert; and the Court of King's
Bench, and afterwards the Exchequer Chamber, held that Calvert had not
such an interest as could be extended, and that Price had power to indorse
the bill, and judgment was given for the plaintiff. See 6 T. R. 123; 1 B. &
P. 101; Selw. N. P. 337. 4th edit.

(C) WITH REFERENCE TO THE TIME OF MAKING THE TRANSFER.

(a) *Before filled up.*

1. *RUSSEL v. LANGSTAFFE*. M. T. 1781. K. B. 2 Doug. 514. S. P. COLLIS
v. EMMETT. H. T. 1791. C. P. 1 H. Bl. 313

The defendant, to accommodate one G., indorsed his name on five copper-
plate checks, made in the form of promissory notes, but in blank, without any
sums, dates, or times of payment being mentioned therein, and delivered them
to G. G. filled them up as he thought fit, and the plaintiff discounted them;
the plaintiff knew the notes were blank at the time of the indorsement. G.
not paying them when they became due, the plaintiff brought this action. such bill
Hotham. Bar., before whom the cause was tried, was of opinion, that as the chooses to
notes were in blank when the defendant indorsed them, they were not then insert.*

* And where A. drew and indorsed a bill with blanks for the sum and date, on the firm
of A., B., and C., for the purpose of raising money for the partnership, and the bill was
filled up and negotiated by the clerk after the death of A. it was holden B. and C. were lia-
ble to a *bona fide* holder; *Usher v. Dauncey*, 4 Campb. 97. abridged post, title Partners.

promissory notes, and that no subsequent act of G. could alter the original nature and operation of the defendant's signature, which when written was a mere nullity; and he accordingly directed a verdict for the defendant. But upon an application for a new trial, after cause shown, Lord Mansfield said that nothing could be so clear; the indorsement on a blank note is a letter of credit for an indefinite sum; the defendant said, trust G. to say amount, and I will be his security. It does not lie in his mouth to say the indorsements were not regular. A new trial was accordingly granted; and a verdict having been found for the plaintiff in a similar action before Lord Mansfield, the defendant submitted in this without going to a second trial.

2. *PASSMORE v. NORTH.* E. T. 1811. K. B. 13 East. 517.

[403]

And if a bill of exchange be post-dated, an indorsement before the date will entitle the indorsee to sue the drawer, although the indorser dies before the day the bill purports to have been made.

The defendant, on the 4th of May, 1810, drew a bill of exchange, which he dated on the 11th of May, 1810, payable 65 days after date, and delivered it to the payee, who, after indorsing it to the plaintiff for a valuable consideration to the plaintiff, on the 5th of May, died on that day. After the 4th, and before the 11th of May, the defendant received effects of the payees to answer this bill. On the 12th of May the defendant advised the drawees of the bill having been drawn, and of the payee's death, and desired them not to accept or pay the bill. Acceptance and payment were accordingly refused, and this action was brought against the drawer. A verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on a case reserved. The Court, after adverting to the 17 Geo. 3. c. 30. which directs, that bills of exchange and promissory notes, &c. for sums of 20s. and less than 5*l.* "shall bear date before or at the time of drawing or issuing the same, and not on any day subsequent thereto;" and observing that it was to be implied therefrom, that the same regulation was not necessary to be observed in other bills for larger sums; and after noticing the provisions of the 48 Geo. 3. c. 149. as to not post-dating drafts upon bankers, unless drawn upon bills of exchange stamps, held clearly that the plaintiff was entitled to recover for the whole amount of the bill; the date of a bill, as of a deed, being in itself quite immaterial in respect of the obligation of the parties to it, and only serving to ascertain by reference the period at which the instrument was to take effect, which would be presumed to operate immediately, if another period of operation were assigned. Plaintiff had judgment accordingly. See ante, p. 302; and Com. Dig. 338. *Fait*, B. 3; *Doug.* 514; 1 East. 435.

(b) *Before acceptance.*

1. *CROSSLEY v. HAM.* E. T. 1811. K. B. 13 East. 498.

Though a bill be indorsed over before the time appointed for its payment yet if it has been dishonoured by the drawee's having refused acceptance, the indorsee will be liable to the same objections as might have been taken against his indorser, if he take the bill with a knowledge of its having been dishonoured.

The defendant, for the accommodation of A. B. indorsed two bills, drawn by A. B. in America, upon C. D. and Co. in London, for 450*l.* each, in favour of the defendant, dated the 10th of Feb. 1804, and payable 60 days after sight. These bills were paid over by A. B. to E. F. in February 1804. The defendants and E. F. then, and until after the 14th of April, 1808, resided in America. On the 1st of March E. F. indorsed and remitted the bills to his agents in London, with directions to make a payment to the plaintiff, to whom he then and still was indebted. On the 20th of April the bills were presented for acceptance, dishonoured, and protested for non-acceptance; and notice given to the defendant. The plaintiff having been advised of the remittance by a letter from E. F. dated on the 12th of April, applied to E. F.'s agents for 450*l.*; and on the 6th of June they delivered one of the bills to the plaintiff, apprizing him of its dishonour; and that therefore he took the bill, subject to all objections. The bill became due on the 29th of June, and payment being refused, this action was brought. The defendant, however, produced at the trial an instrument signed by E. F. dated the 14th of April, 1804, by which he agreed that the defendant, on paying one of the bills in London, should be exonerated from paying the other; and the defendant proved his having on the 2d of July paid one of the bills which then remained in the hands of E. F.'s agents. A verdict was found for the plaintiff, and a case reserved for the opinion of the court. The Court (*Le Blanc, J. absente*) held, the bankrupt having taken this bill after its dishonour had taken it with all its infirmities,

and subject to the agreement between E. F. and the defendant.—*Postea* to the [404] defendant. See 7 T. R. 423.

2. O'KEEFFE v. DUNN. T. T. 1815. C. P. 1 Marsh. 613; S. C. 6 Taunt. 305. Affirmed in error. T. T. 1816. K. B. 5 M. & S. 282.

This was an action by the indorsee of a bill against the drawer. The payee had presented it for acceptance, which was refused; but no notice of such dishonour was given to the drawer, and the payee afterwards indorsed over the bill without notice to the plaintiff of such refusal to accept, and the latter again presented the bill for acceptance, which was again refused. But if he take the bill ignorant of the laches for valuable consideration, such indorsee may sue the drawer or prior indorser.

Per Cur. (Chambre, J. dissent.) He who takes a bill after it has arrived at maturity, takes it subject to all the defences which could have been made by any previous holder, for the bill being unpaid, its date is sufficient to put him on inquiry; but if he takes the bill before it is due, he takes it not subject to the same infirmity of title, because he then takes it without notice of any suspicious circumstances that may break in upon his remedy against any former holder. This is the general law; but there may be circumstances that may make it otherwise. A holder is not bound to present a bill for acceptance; there is nothing therefore on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance and refused. But it is said, the general law is, that where notice is requisite, if notice be not given, the drawer, and all persons claiming to be entitled to have notice of the dishonour, are discharged. We think this is a begging of the question; for if a holder be informed that the drawee will not accept, or will not pay the bill when it becomes due, and omits to give notice, he shall never sue the drawer, because his neglect prevents the drawer from using diligence in withdrawing from the drawee the effects which were destined to satisfy the bill. But we are of opinion, that if the bill is passed for a valuable consideration without notice of that defect of title, he who so innocently takes the bill is not guilty of any breach of duty towards the drawer, and is therefore not affected by the prior holder's omission. *Roscoe v. Hardy*, 12 East. 434. is mainly distinguishable from the present case in respect that the bill there continued up to the time of its maturity in the hands of a holder, who had neglected to give that notice at the time when the bill was first refused acceptance; and the holder, we agree, had thereby, as to his *own claim*, discharged the drawer. We are of opinion, that the circumstance of the bill continuing in the same hand materially distinguishes that case from the present. We therefore think, that the plaintiff not having had notice that the bill had been presented for acceptance, and dishonoured before he took it, is entitled to recover. [405]

(c) *After due.*

1. MUTFORD v. WALCOTT. T. T. 1700. K. B. 1 Ld. Raym. S. C. 1 Salk. 129. S. C. 12 Mod. 410; S. P. *DEHERS v. HARRIOT*. T. T. 1691. K. B. 1 Show. 163.

Per Holt, C. J. I remember a case where an action was brought upon a bill which appeared to have been *negotiated* after the day of its payment. On the question whether the plaintiff could declare on the bill, or whether he ought to have brought *indebitatus assumpsit*, all the eminent merchants in London held it to be a very common and usual practice. A bill may be indorsed after it is due.

2. BROWN v. DAVIES. H. T. 1789. K. B. 3 T. R. 80. S. P. *TAYLOR v. MATHER*. E. T. 1787. K. B. cited 3 T. R. 83.

The defendant drew a note payable to one S. or order; S. indorsed it to one T. and he had it presented and noted for non-payment. Defendant then paid the money to S. and he took up the note from T. but, instead of returning the note to the defendant, indorsed it to the plaintiff, who thereupon brought this action against defendant as maker; and on the defendant's offering to prove these facts, Lord Kenyon, C. J., who tried the case, thought they would not amount to a defence, unless it could be proved that plaintiff knew them when he took the note; and he rejected the evidence. But upon notice for a new trial, Lord Kenyon said, he thought the rule ought to be made absolute, since the case ought to have been further inquired into, as he did not, at the trial, But the indorsee of an over due bill or note takes it, subject to all the objections it was liable to, in the hands of the indorser.

remember that the bill had been noted, which ought to have excited the suspicion of the plaintiff. And the Court said, that the party taking a note after it was due was to be considered as taking it on the credit of the person from whom he received; and that whatever would be a defence against the giver, would be against the receiver also; provided, Lord Kenyon, C. J. said, if the note appeared on the face of it to have been dishonoured, or if knowledge could be brought home to the indorsee that it had been so, otherwise he could not go that length.—Rule absolute.

3. *TILSON V. FRANCIS*. L. R. 1807. N. P. 1 Camp 19.

Therefore a bona fide indorsee of an accommodation note after due cannot maintain an action upon it against the maker. [406] So if the indorser of a note be only agent, and he transfer it to another after due, the latter cannot retain it against the principal indorser.

Action by indorsee against maker of a promissory note. Defence, that defendant gave the note to accommodate the payee, who retained it until after it became due, and then gave it to one A., to be returned to defendant, who indorsed it to plaintiff. Plaintiff proved consideration for the bill, and also entire ignorance of the transaction. Lord Ellenborough observed, after a bill is due, if a party take it, although he may have given a valuable consideration for it, he does it on the responsibility of the indorser alone, and subject to all the equities it was liable to in the hands of the original holder.—Verdict for defendant.

4. *LEE V. ZAGURY*. M. T. 1817. C. P. 8 Taunt. 114; S. C. 1 Moore. 556.

In an action on a bill, it appeared that A. B. having a bill, accepted by defendant, over due, sent it to C. D., that C. D.'s correspondent might procure payment for him. C. D.'s correspondent indorsed it to E. F., for a debt he owed him, and E. F. not being able to obtain the money, got a new bill from defendant for the amount, and indorsed it to plaintiff as his agent. The defence was, that plaintiffs were mere agents for E. F., and that as E. F. took the first bill after it was due, he stood in the place of C. D.; and as C. D. would have been accountable to A. B., E. F. was equally so, and then the second bill was, as against E. F., the property of A. B., and that a prohibition by A. B. to defendant not to pay the second bill, was an answer to the action. The defendant had a verdict; and on motion for a new trial, the Court held the plaintiffs were mere agents to E. F., and that the second bill belonged to A. B.

5. *BONSANQUET V. DUDMAN*. M. T. 1814. K. B. N. P. 1 Stark. 2.

But if a man deposit a bill with another before it is due, and take it from him before it is due, and re-delivers it to him after it is due, he will stand in the same situation as if he had never parted with it. So in an action against acceptor, it is no defence that the bill was indorsed over by plaintiffs to A., who held it 3 months after due, and had received another bill from drawer for

The plaintiff's bankers sued as indorsees of a bill. It appeared that A. B. kept an account with the plaintiffs, and had deposited the bill in question with them as a collateral security. A. B. being indebted to the plaintiffs in a larger amount, before it became due A. B. obtained the bill from plaintiff, and the bill being dishonoured, remitted it again to the plaintiffs, requesting them to retain it till it was paid. In an action by the plaintiffs against the acceptor, he proposed to prove that it was merely an accommodation bill between him, the drawer, and A. B., the indorsee, who had indorsed it to plaintiffs; contending, as plaintiffs had taken it after it was due, they could not recover. But Lord Ellenborough, C. J. said, as soon as the bill was re-delivered to the plaintiffs they were restored to their former right.—Verdict for plaintiff.

6. *BUZZARD V. FLECKNOE*. T. T. 1816. K. B. N. P. 1 Stark. 333.

Action by indorsees of a bill drawn by A. B. and accepted by defendant. A. B. being indebted to the plaintiffs indorsed to them the bill in question, and they, before it became due, indorsed it to C. D., who held it three months after it had arrived at maturity, and had taken another from the drawer for the purpose of enabling them to take up the former bill. It was contended, as C. D. could not recover, the plaintiff must be viewed in the same light, and therefore he could not. But Lord Ellenborough, C. J. said, that as the plaintiffs were the original indorsees for a valuable consideration, the plaintiffs were entitled to recover.

7. *CORRENBRIDGE V. FARQUHARSON*. E. T. 1816. K. B. 1 Stark. N. P. 259.

The bill in question had been deposited with A. B. after it became due he indorsed it to the plaintiff; there being then an account between defendant and A. B. which would have regulated the extent to which A. B. could have recovered. In an action by indorsee against defendant as indorser, the defend-

ant offered in evidence A. B.'s books, to show how these accounts stood, and insisted that whatever would have been evidence against A. B. would be evidence against plaintiff. But Lord Ellenborough, C. J. rejected the evidence, observing, that any entry made by A. B. at the time of the deposit, and accompanying his act, would have been evidence, but an entry not accompanying the act could not be received, as it might have been made purposely to defeat this action.

bill after it is due is exposed to all objections, he is not liable to every description of evidence to which that person from whom he took it might have been.

(d) *After actual payment.*

1. *BECK v. ROBLEY.* T. T. 1773. K. B. 1 H. Bl. 89. n.

In this case one Brown drew a bill upon the defendant, which he accepted payable to H. or order. Defendant did not pay it when it was presented, upon which, Brown took it up. Brown afterwards indorsed it to the plaintiff, who brought this action upon it against the defendant; but the jury thought, that when Brown took up the bill, its negotiability ceased, and found for the defendant; and on a rule nisi, for a new trial, the Court thought the jury right, because if it were negotiable, H. would be liable.

2. *CALLOW v. LAWRENCE.* T. T. 1814. K. B. 3 M. & S. 95.

Pywell drew a bill on defendant, payable to his own order, and indorsed to Taylor; defendant accepted the bill, but did not pay it; Pywell took it up, and indorsed it to plaintiff. It was urged that after Pywell had once paid it, he could not indorse it; its negotiability was at an end. Put on cause shown, the Court were clear that Pywell's payment did not terminate its negotiability because his indorsement would make no person liable but himself and defendant, and defendant had never been discharged; and they observed, that the case of *Beck v. Robley* (*supra*), which was cited in argument, stood on its own peculiar grounds, because there the bill was drawn payable to the order of a third person, who indorsed it; and if, after it was taken up by the drawer, it had continued negotiable in his hands, that third person would have been liable, for which *Lord Mansfield* said there was no colour. See 1 Wils. 46; 3 T. R. 80.

3. *BURBRIDGE v. MANNERS.* H. T. 1812. K. B. N. P. 3 Campb. 194.

In an action against payee of a note, it appeared, before it became due some person went to the bankers where it lay, and took it up; it was not cancelled, nor any minute made upon it to denote its payment. Prior to its arriving at maturity, it was indorsed to the plaintiff for a valuable consideration; and in this action by him it was urged, that after payment it could not be negotiated.

But Lord Ellenborough, C. J. said, that rule does not apply to a payment of this description; it means, a payment in the ordinary course, that is, after it became due; here was nothing to excite the holder's suspicion, its time for payment not having arrived.—Verdict for plaintiff.

(D) WITH REFERENCE TO THE MODE OF MAKING THE TRANSFER.

1st. BY INDORSEMENT.

(a) *In Writing.*

GEARY v. PHILLIP. H. T. 1826. K. B. MS.

This was an action on a promissory note for 30*l.* indorsed by William Kemp, in pencil. The jury at the trial found a verdict for the plaintiff, and liberty was given to move to enter a nonsuit. On motion to set aside the verdict, the question was, whether the indorsement was sufficient. Promissory notes, it was contended, had been placed on a footing with bills of exchange, and became assignable *choses* in action by indorsement; that indorsement, however, must be written with ink. Pollock, for the defendant, contended, 1st, that the indorsement was no indorsement in law; and, 2dly, that it was contrary to the usage and custom of merchants. The plaintiff could not recover in the action, because there was no evidence to show a pencil indorsement had ever been

* And where the drawer and payee of a bill after it has become due, indorses it to B. on condition that he will take up certain bills discounted by the payee, B. does not take up the bills, but transfers the bill in question to C., the latter may recover against the acceptor. *Wright v. Hay.* 2 Stark. 398.

[407]
the purpose
of taking it
up.*

And though
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Though a
bill cannot
be indorsed
after it has
been once
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to render
any of the
parties lia-
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drawee of
a bill paya-
ble to his
own order,
may nego-
ciate it af-
ter he has
once paid
it, because
such in-
dorsement
will make
no person
liable but
himself and
those whom
he might
sue.

And a note
paid and
re-issued
[408]
before it
becomes
due is a
valuable in
the hands of
a *bona fide*
indorsee
without no-
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An indorse-
ment on a
bill or note
must be in
writing; but
its being in
pencil, in-
stead of
ink, is
good.

received by the Court. The motion was opposed by Thessiger, and the case of *Jeffrey v. Walton*, 1 Stark. 267. cited, that was an action for the hire of a horse. The plaintiff had written in pencil upon a card, "Six weeks at two guineas." The card was admitted as evidence to prove the terms of the hiring. Lord Ellenborough applied the technical rule of law to that case, and held, that they could not vary the effect of the pencil writing by parol testimony. There were several cases which applied to deeds. It was well known, that nothing but parchment or vellum and ink could do for a deed; but a promissory note was a negotiable security, which actually carried upon the face of it the intention of the party by whom it was issued. The next question was, whether the indorsement was according to the custom of merchants.

Per Cur. If you look to the old cases, you will see what the custom was; an indorsement must be in writing. They do not say it must be in ink. There is no great danger that our decision in favour of the plaintiff in this case will lead to bad examples, for the imperfection of this mode of writing is so great that it will induce persons to take care they have indorsements in ink. There may be particular occasions when ink cannot be had. It cannot be said, writing by pencil is not writing, and it is only required that an indorsement shall be in writing.—Judgment for the plaintiff.

(b) *How made when intended to be general.**

1. *ORD AND OTHERS V. PORTAL.* E. T. 1812. N. P. 3 Camp. 239.

Action by the indorsees of a bill of exchange, indorsed in blank by the drawer, against the acceptor; the plaintiffs not having shown their partnership, or that the bill had been indorsed to them jointly, it was insisted that they ought to be nonsuited; but Lord Ellenborough held there was no necessity for such evidence, since a blank indorsement conveyed a right of action to any parties who chose to sue on the bill.—Verdict for plaintiff.

2. *CLARK V. PIGOT.* E. T. 1693. K. B. 12 Mod. 192, S. C. 1 Salk. 126. S. P. *LAMBERT V. PACK.* E. T. 1638. K. B. 1 Salk. 127. S. P. *LAMBERT V. OAKES.* M. T. 1697. K. B. 12 Mod. 244; S. C. 1 Ld. Raym. 443; S. C. Holt. 118. S. P. *THEED V. LOVELL.* M. T. 1738. K. B. 2 Stra. 1103. S. P. *DEHERS V. HARRIOT.* T. T. 4691. K. B. 1 Show. 163.

A blank indorsement conveys a joint right of action to as many persons as agree in signing on the bill, without any proof of joint interest.

It has been holden that a blank indorsement does not transfer the bill without some further act.

In an *assumpsit* on a bill of exchange, the case was: D. drew a bill of exchange, at Bristol, on Pigot in London, payable to Clerk, or order, at 28 days' sight. Clerk living at Bristol, sends the bill with one K. to London, and his name indorsed thereon, but a blank space over his name. K. presented it to Pigot, who accepted it, and for non-payment, Clerk brought this action. It was alleged the action should have been brought by K., because, by Clerk's indorsing his name, the property was transferred from him to K. But Holt, C. J. held, that there being a blank space left over the name of Clerk, as is usual in bills of exchange, it was at the election of K. either to make use of it as his servant, or order. If he had filled up the blank space, and made it payable to him, as he might have done if he would, then the property of the bill had been transferred to him, and he only could have maintained this action against the acceptor; but seeing he has not filled up the blank space, he thereby declares his intention to act only as a servant of Clerk, whose name was put there, that, on payment thereof, a receipt might be wrote for the money over his name, otherwise this action would not be maintainable by Clerk.

3. *MOORE V. MANNING.* M. T. 1718. C. P. 1 Com. Rep. 311.

Assumpsit on a note drawn by the defendant, payable to Statham, or order.

But it is now settled that such

* This is done by the mere writing of the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made; 2 Doug. 633; 6 East. 21. So an indorsement made upon a bill or note thus, "I give the note to A." is sufficient to vest it generally in A.; 4 Ves. 565. But the mere circumstance of the payee putting a number or any private mark on a bill, will not be equivalent to an indorsement; 3 T. R. 747; 3 Ves. 368. And where a party promised to indorse a bill not then drawn, and upon the faith of such promise a stranger wrote an indorsement in the name of the party, it was holden that such indorsement was nugatory; 4 Campb. 51. The indorsement being made upon the face of the bill, instead of the back, does not affect its validity. *Per Cur.* *Yarborough v. Bank of England*, 16 East. 12.

Statham indorsed it to Witherhead, but did not add "or to his order," and [410] Witherhead indorsed it to the plaintiff. The defendant contended, that as an indorsement is sufficient to vest the bill or note transferred to Witherhead, the right of assigning was transferred also; and the in the indorsee,*

4. ANCHER V. BANK OF ENGLAND. E. T. 1781. K. B. 2 Doug. 639.

Per Lord Mansfield, C. J. A blank indorsement makes the bill payable And makes the bill payable to bearer. to bearer; but by a special indorsement the holder may restrain its negotiability.

5. SMITH AND OTHERS V. CLARKE. E. T. 1794. N. P. Peake. 225; S. C. 1 Esp. 180.

This was an action on a bill of exchange, which, it appeared, was indorsed Therefore in blank by the payee, and after several indorsements came to A., under a after an in special indorsement to him or order. A., without indorsing it, sent it to B., indorsement who discounted it with the plaintiff. Plaintiffs struck out all the indorsements in blank, it but the first. The defendant thereupon contended, that the special indorsement is assigna- ment restrained the negotiability of the bill, and that the plaintiffs could not delivery. recover without an indorsement from A. But Lord Kenyon said, the plaintiffs may strike out all the other indorsements without affecting the other party's interests, because the special indorsement was made after the payee had indorsed it.—Verdict for the plaintiffs. See 4 Esp; 120.

6. ROBERTS AND OTHERS V. EDEN. E. T. 1799. C. P. 1 B. & P. 398. S. P.

TREUTTEL V. BARANDON. 8 Taunt. 100; S. C. 1 Moore. 443.

Assumpsit by the assignees of a bankrupt, indorsee, against the maker of But where a promissory note. It appeared, that the defendant had, in April, 1792, drawn A. indorsed the note in question, payable on demand to A. B. in discharge of a sum to that A. indorsed a promissory note, payable on demand to A. B. to C. D.; to whom the plaintiffs were assignees; to secure money B., and desired him to keep it, as he (A.) would want it to settle with C. from whom he received it, the Court held it no indorsement from A. to B. [411] advanced in course of trade. In 1793, A. B. settled accounts with the defendant, who then paid the balance; but this note was not delivered up, nor demanded. The note had been deposited and returned several times between A. B. and C. D., during which period the balance was in favour of C. D.. A. B. at one time, before the last deposit of the note in C. D.'s hands, though the precise date was not shown, informed C. D. that he must not negotiate it, as an account he should have occasion for it when he settled accounts with the defendant. The defendants contended, that the circumstances disclosed should naturally have given rise to suspicion in C. D.'s mind that something existed militating against the validity of the note, and should have induced inquiries as to its correctness; and he compared it to the negotiation of an over-due bill of exchange, and insisted that therefore C. D. could not take an interest in it greater than was possessed by A. B., who passed it to him. In answer, the plaintiff's counsel urged the circumstance of A. B.'s intimation, restraining the negotiation of the note by C. D. as a confirmation of C. D.'s right to recover, as it showed that an account was still open between A. B. and the defendant. He distinguished this note from an over-due bill of exchange, as it was payable on demand, and therefore a permanent security, and he denied that the possession of the note by C. D. affected the plaintiff's case, as it was incumbent on the defendant to have procured its restoration when he balanced accounts with A. B. The jury found for the defendant; and a rule nisi for a new trial being moved for, the Court were of opinion that the verdict was correct. They said, that A. B.'s intimation was equivalent to telling C. D. that the note was not his own, but left with him as a mere pledge; and they concurred with the arguments of the defendant's counsel, that C. D.'s situation was precisely similar to that of A. B. The plaintiff's counsel declined taking

* But where after indorsement, and before delivery to the indorsee or his agent, the bill was taken under an extent against the indorser, it was holden that the crown was entitled to it; *Rex v. Lampton*, 5 Price, 428. abridged post, Extent.

the rule. See 2 Plac. 1156; 1 B. & P. 547; 9 East. 12.

(c) *How made when intended to be special.*

1. *ACHESON V. FOUNTAIN*. T. T. 1722. K. B. 1 Stra. 557.

A special indorsement names the party in whose favour it is made, and makes the bill, in the first instance, transferable by him only.

Action on a bill. The plaintiff had declared on an indorsement, made by William Abercrombie, whereby he appointed the payment to be to L. A. or order, and on producing the bill in evidence, it appeared to be payable to Abercrombie or order; but the indorsement was only in these words, "Pray pay the contents to L. A.;" and therefore it was objected, that the indorsement not being to order, did not agree with the plaintiff's declaration. Put on consideration, the whole Court were of opinion it was well enough, that being the legal import of the indorsement, and that the plaintiff might on this have indorsed it over to another, who would be the proper indorsee of the first indorser. Therefore judgment was given for the plaintiff.

2. *EDIE V. THE EAST INDIA COMPANY*. T. T. 1760. K. B. 2 Eurr. 1216; S. C. 1 Black. 295.

He may exercise this right with out the insertion of the word "order."

A foreign bill, drawn upon the East India Company, was payable to Campbell or order. Campbell indorsed it to Ogilby, but did not insert the words "or order," or any transferrable words in the indorsement. Ogilby indorsed it to the plaintiffs. It was insisted, that under the indorsement to Ogilby he had no authority to indorse it over, and upon that ground the jury found for the defendants. Put, upon a rule to show cause why there should not be a new trial, and cause shown, the Court was clear, that as the bill was originally in its nature negotiable, it continued so in the hands of Ogilby, and that his indorsement was good, and a new trial was granted.

3. *ANCHER V. BANK OF ENGLAND*. E. T. 1780. K. B. 2 Doug. 637.

[412] But the negotiability of the bill can only be restrained by restrictive words, as by limiting the payment to a particular person;

A bill was drawn by the plaintiffs, on Claus, Heide, and Co. payable to Jens. Mæstue, or order: Mæstue indorsed it to this effect, "The within must be credited to Capt. M. L. Dahl, value in account," and sent it to Claus, Heide, and Co. who credited Dahl for the amount, and gave notice to Dahl, and the plaintiffs, that they had done so; afterwards an indorsement was forged upon the bill in English, "for me to pay Mr. Detleff Muller, or order, Morten L. Dahl." Muller, who was a clerk in the house of the acceptors, carried the bill, thus indorsed, but which never had been in the hands of Dahl, to the Bank, and indorsed it with his own name; upon which it was discounted in the usual course of business. When the day of payment came, the acceptors having become insolvent, and Miller having absconded, the bill was protested; and one Fulberg, as a friend or agent for the plaintiffs, came to the Bank, and paid it for their honour as the drawers; but the forgery having been discovered, this action for money had and received was brought against the Bank, on the ground that the bill was not negotiable, on account of the special indorsement, and that it had, therefore, been discounted by the Bank in their own wrong, and the money paid by Fulberg to take it up paid by mistake. At the trial, Lord Mansfield directed a nonsuit. But upon a rule to show cause why there should not be a new trial, Lord Mansfield, C. J. and Willes and Ashurst, Js. thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but, Fuller, J. thought otherwise, and a new trial was granted. Upon the second trial, Lord Mansfield directed the jury to find for the plaintiffs, which they did; and Lord Mansfield, and Willes and Ashurst, Js. were of opinion that the negotiability of the bill was restrained, because, by a special indorsement, the holder may stop the negotiability.

4. *EDIE V. EAST INDIA COMPANY*. T. T. 1760. K. B. 2 Burr. 1216; S. C. 1 Blac. 295.

Or by requesting the drawee "to pay it for my (the payee's) use."

Per Wilmot, J. The negotiability of a bill may be restrained by an indorsement conveying a naked authority to the indorsee to receive the contents for the payee; for he may write upon it "Pray pay the money to my servant for my use," or such expressions as show that the bill is not to be indorsed over.

5 *POTTS V. REED*. T. T. 1803. K. B. N. P. 6 Esp. 57.

But an indorsement is not re

The indorsement on this bill was in these words, "Pay the contents of the bill to A. B. being part of the consideration in a certain deed of assignment

executed by the said A. B. to the indorsers and others;" on the question whether this was a restrictive indorsement, Lord Ellenborough, C. J. held this not a restrictive indorsement, and as to the other words, he said they were surplusage, and could not effect the subsequent negociability of the bill.

HAWKINS v. CARDY. M. T. 1698. K. B. 1 Lord Raym. 360; S. C. Carth 466; [413] S. C. 12 Mod. 213; S. C. 1 Salk. 65.

In an action on a bill of exchange, whereby the defendant promised to pay to R. A. or order, 460*l.* who indorsed 44*l.* thereof to the plaintiff, who as indorsee brought this action for the said 44*l.* part of the said 460*l.* The defendant pleaded an insufficient plea, and the plaintiff demurred; and it was held, that this holder's personal contract was entire, and could not be apportioned and multiplied into several accounts; so that if A. draws a bill on 100*l.* payable to B. or order; B. cannot assign 50*l.* thereof, so as his assignee shall have an action for the same; and if B. himself brings an action for part, he must acknowledge satisfaction for the residue.

7. JOHNSON v. KENNIE. E. T. 1764. C. P. 2 Wils. 262.

The defendant drew a bill of exchange for 1000*l.* in favour of Benson or order, and Benson indorsed it over to the plaintiff; Benson paid the plaintiff 232*l.* notwithstanding which, he took a verdict against the defendant for the whole 1000*l.*; and upon a rule nisi for a new trial, upon this ground, the Court, after cause shown, refused the new trial, and said, when the defendant has paid the 1000*l.* there is an end of the contract; when the drawer of a bill has paid part, you may indorse it over for the residue, otherwise not, because it would subject him to a variety of actions.

(d) *How made on notes under 5*l.**

An indorsement upon bills and notes for the payment of a less sum than 5*l.* must be attested by one subscribing witness; 17 Geo. 3. c. 30. s. 1.

2d. BY DELIVERY.

(a) *When bill or note indorsed in blank, or payable to bearer,*

ANON. M. T. 1698. K. B. 3 Salk. 71; S. C. 1 Salk. 126. S. P. BANK OF ENGLAND v. NEWMAN. E. T. 1699. K. B. 1 Com. 57; S. C. 12 Mod. 241; S. C. 1 Lord Raym. 442; S. C. Bul. N. P. 277.

A Bank bill payable to A. or bearer, being given to A. and lost, was found by a stranger, who transferred it to C. for a valuable consideration; C. got a new bill made out in his own name.

Per Holt, C. J. A. may have an action of trover against the stranger who found the bill, for he had no title, though the payment to him have indemnified the Bank; but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the assignee or bearer.

(b) *When bill or note payable to a fictitious person.*

A bill payable to a fictitious person will operate against all parties aware of the circumstance as a bill payable to bearer, and is consequently transferable by delivery; Gibson v. Minnet, 1 H. Bl. 600. abridged ante, p. 269.

(E) WITH REFERENCE TO THE EFFECT OF MAKING THE TRANSFER.†

(a) *When made by indorsement.*

1 WILLIAMS v. FIELD. E. T. 1692. 3 Salk. 68; SMALLWOOD v. VERNON. M. T. 1721. K. B. 1 Stra. 479. CLAXTON v. SWIFT. M. T. 1727. K. B. 1 Show. 441; S. C. 495. 501; Skin. 255. HEYLYN v. ADAMSON. 2 Burr. 674. HILL v. LEWIS. H. T. 1709. K. B. 1 Salk. 131; Semb. S. C. 1 Lord Raym. 743.

* Though an indorsement to "pay the contents to A. B., on my being gazetted ensign in a given time," is restrictive, and will give no subsequent indorsee a right to the money, unless he is gazetted; Robertson v. Kensington, 4 Taunt. 30. abridged ante, p. 335.

† The indorsement of a bill or note implies an undertaking from the indorser to the person in whose favour it is made, and to every other person to whom the bill or note may afterwards be transferred, exactly similar to that which is implied by drawing a bill, except that in the case of a note the stipulations with respect to the drawee's responsibility and undertaking do not apply; and a transfer by delivery only, if made on account of an antecedent debt, implies a similar undertaking from the person making it to the person in whose favour it is made; Bayl. 129-

The act of indorsing a bill or note, is in effect the making of a new bill or note. *Per Cur.* Where a bill is drawn, payable to W. R. or order, and he indorses it to B. who indorses to C. and he indorses it to D. the last indorsee may bring an action against any of the indorsers, because every indorsement is a new bill, and implies a warranty by the indorsers that the money should be paid. See 1 *Atk.* 282; 2 *id.* 182; 1 *H. Bl.* 587; *Holt* 115.

2. *HARRY V. PERIOT*. T. T. 1709. K. B. 1 Salk. 133. *BULLER V. CRIPS*. M. T. 1702. K. B. 6 Mod. 30 *per Holt*, *C. J. WILLIAMS V. FIELD*. E. T. 1693 K. B. 3 Salk. 68.

And the indorser's situation is in every respect similar to that of the drawer drawn the bill. Action on a promissory note against the second indorser; the declaration contained no averment that the money was demanded of the drawer or first indorser. On motion in arrest of judgment, the Court held the declaration good, for the indorser charges himself in the same manner as if he had originally drawn the bill.

3. *BALLINGALLS V. GLOSTER*. E. T. 1803. K. B. 3 East. 481.

Hence on the refusal of the drawer to accept, he is immediately liable. John Gloster drew a bill on Jackson, payable to Anthony Gloster's order, and the latter indorsed it to the plaintiffs. Jackson refused acceptance, on which the plaintiffs immediately sued Anthony Gloster, without waiting until the bill, which was drawn at 90 day's sight, would have been due. The plaintiffs had a verdict, with liberty to the defendant to move for a nonsuit. On rule *nisi* accordingly, it was urged that an indorser stood in a situation different from that of a drawer; and that although a drawer might be sued immediately on non-acceptance, an indorser could not until the expiration of the time limited for the payment of the bill; but the Court was clear that the case of an indorser was not distinguishable from that of a drawer.—Rule discharged.

4. *HILL V. LEWIS*. H. T. 1707. K. B. 1 Salk. 183; *semb.* S. C. 1 Ld. Raym. 1743. S. P. *EDIE V. EAST INDIA COMPANY*. Burr. 1826; S. C. 1 Blac. 295.

Whether the instrument contains words making it assignable or not.

More drew a note payable to the defendant, or his order, and another payable to him generally, without any words to make it assignable; the defendant indorsed them to Zouch, and Zouch to the plaintiff. The first objection was that the plaintiff had been guilty of *laches*, but the jury thought he had not and it was then urged that the second note was not assignable. And Holt, C. J. agreed that the indorsement of this note did not make him that drew it chargeable to the indorsee, for the words "or to his order" give authority to assign it by indorsement; but the indorsement of a note, which has not these words, is as to make the indorser chargeable to the indorsee.

5. *WALSH V. TYLER*. M. M. 1817. K. B. N. P. 2 Stark. 288.

When the holder of a bill has indorsed to him by the drawee a second bill to get discounted, to provide for the first, he holds it as a trustee for himself, and may retain the proceeds.

Declaration on a bill of exchange, dated 18th March, 1817, for 50*l.* payable three month after date, drawn by John Shaw on defendant Tyler, and indorsed by him to the plaintiff. The defence was, that Shaw, the drawer, sent the bill to the plaintiff to be discounted, and with a request to send the amount to Shaw, in order that he might take up a bill for 77*l.* 10*s.* then falling due, and that the plaintiff did not send up the money; and afterwards the bill for 77*l.* 10*s.* having been returned to and paid by him, he proved the amount under Shaw's commission. Per Lord Ellenborough, this affords no defence. If the produce of the bill was to have been applied for another purpose, then the plaintiff had no right to retain the bill, or sustain this action; but the plaintiff being unable to discount the bill, and having been compelled to pay that to which he was a party he had a right to protect himself by applying the bill in question to cover his own advance.

6. *GOGGERLY V. CUTHBERT*. H. T. 1806. C. P. 2 N. R. 170.

Where a bill or note has been improperly indorsed after due, a party interested in it may maintain

In trover for a bill of exchange, it appeared that the bill had been drawn in favour of the plaintiff, who having procured it to be accepted, indorsed it, and deposited it with one A., in order to raise money thereon. A. did not have it discounted, but placed it in the hands of his brother, who, two years after the bill became due, gave it to the defendant, without consideration. The jury, on these facts found for the plaintiff; and on a rule *nisi* for the entry of a nonsuit, the Court said, that as it had been shown the plaintiff indorsed the bill for the purpose of raising money thereon, and not in order to its nego-

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tiation, the plaintiff could always have demanded it from A., and, consequently, from any person who possessed it without any consideration.—Rule discharged.

7. *MURRAY V. THE EAST INDIA COMPANY*. M. T. 1821. K. B. 5 B. & A. 204. Where an agent, resident abroad, having money in his hands belonging to his principal, purchased a bill of exchange, for the purpose of transmitting the value to England, which he indorsed especially to his principal. The latter at the time of indorsement, was dead, but that fact was not known to the agent. In an action brought upon such bill, by the administrator of the principal, it was urged that no property in the bill could pass to him, and that, consequently, he could not sue upon it. But the Court held, that as the money given for it was part of the principal's estate, it was competent for the administrator to take the bill as a mode of payment; and that thereby a property vested in him, and a right to sue upon it.
8. *CATHERWOOD V. CHABAUD*. H. T. 1823. K. B. 1 B. & C. 150; S. C. 2 D. & R. 271.

A bill of exchange was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C., died intestate before the bill became due, and before it was paid, or any proceedings commenced upon it. An action was brought by the administrator *de bonis non* of J. C. It was objected for the defendant that the bill was held by S. C. in her own right, and not in her representative capacity, and that therefore the right of action was in her personal representative, and not in the administrator *de bonis non* of J. C., and that there was no privity between the plaintiff and the administratrix of J. C. Plaintiff had a verdict, with leave to defendant to move to enter a nonsuit, which now came before the court. They said, we must refuse the rule. The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right, and not in his representative capacity. That principle has since been altered; and it has been ruled in several modern cases, that upon such contracts an administrator may sue in his representative character. The older cases have, therefore, received a qualification, and are not to be considered law to their full extent.—Rule refused. See 1 Vern. 473; Yelv. 33; Cro. Jac. 4; 10 Mod. 316; 1 T. R. 487; 6 East, 405; 5 Price. 412.

tate, and died before the money was received, held that it remained as a part of the estate, and devolved upon the persons who afterwards became the representatives and who were therefore entitled to sue.

(b) *When made by delivery.* Vide ante, vol. 1. p. 126. and post, tit. Extinction.

1. *WARD V. EVANS*. T. T. 1702. K. B. 2 Ld. Raym. 928; S. C. 1 Com. 138; 6 Mod. 36; 2 Salk. 442; Holt. 120. N. P. *OWENSON V. MOHSE*. 7 T. R. 65.

The plaintiff sent his servant to receive a note of 50*l.* of B., who went with him to Sir S. Evans's shop, who indorsed off 50*l.* from a note B. had on him, and gave the servant a note of 50*l.* on one Wallis, a goldsmith, to whom the note was carried the next day by Ward's servant; Wallis refused to pay it, and failed on that day; on this the note was sent back to Sir S. Evans.

The Court held, that this was no payment, for a goldsmith's note is only paper, and received conditionally, if paid; and not otherwise, without an express agreement to take it as cash. See re Barrington, 2 Sch. & Lef. 112; and ante, vol. 1. p. 126. n.

2. *MOORE V. WARREN. HOLME V. BARRY*. H. T. 1720. K. B. 1 Stra. 415. *S. P. WARD V. EVANS*, supra. ANON. 12 Mod. 408. *TURNER V. MEAD*. M. T. 1720. K. B. 1 Stra. 416.

The defendant, at two o'clock in the afternoon, had given the plaintiffs, goldsmiths, notes in payment, which were tendered the next morning at nine o'clock, when the goldsmiths had a quarter of an hour before stopped payment. Pratt, C. J. directed the jury, that the loss should fall on the defendant, there being no laches in the plaintiff.

3. *CLERK v. MUNDAL*. T. T. 1697. K. B. 12 Mod. 203; S. C. 1 Salk. 124; 3 Salk. 68. ANON. T. T. 1694. K. B. 12 Mod. 408. ANON. id. 517.

A distinction was at one time taken between the transfer of a bill or note for a precedent debt, and for a debt created at the time of the transfer.

[418] But this distinction is now repudiated, and therefore, if the vendor of goods takes bills or notes for them, without agreeing to run the risk of their being paid, and they ultimately prove valueless, this will not be deemed a discharge of the debt.

A having a bill of exchange payable to him, and he being indebted to B. in a sum of money, indorses the bill to B. Afterwards B. brought an action of *assumpsit* against A. for the money, to which the defendant pleaded *non assumpsit*. A gave in evidence this bill of exchange indorsed, and that it had lain so long in B.'s hands after it was payable, and reckoned it as money paid and in his hands; but not allowed; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. For example, if A. sells goods to B., and B. is to give a bill in satisfaction, B. is discharged, though the bill is never paid, for the bill is payment; for otherwise a bill would never discharge a precedent debt or contract; but if part be received, it shall be only a discharge of the old debt for so much. Vide Salk. vol. i. p. 117.

4. *OWENSON v. MORSE*. M. T. 1796. K. B. 7 T. R. 64. S. P. *Ex parte DIXON*. Cited in 6 T. R. 142.

On the trial of an action of trover for some articles of plate, it was proved, that on the 2d of April, about six o'clock in the evening, the plaintiff went to the defendant's shop, at Southampton, and agreed to purchase the goods in question of the defendant, a silversmith, at a certain price; and wishing to have his arms engraved on them, the defendant sent for one Seed, who usually engraved for him, to engrave the arms, and who was directed by both parties to bring back the articles to the defendant, who was to pay for the engraving. The plaintiff, at the time of the agreement, paid the price of the goods in notes of Messrs. Shaw, who kept a bank at Southampton. Before this hour in the afternoon Shaw's house was shut up for the day; and in consequence of the failure of a house in London, Staples and Co., at which these notes were payable, the house of Messrs. Shaw never opened again; and Staples and Co., and Messrs. Shaw, were afterwards declared bankrupts. Seed, having engraved the plate, brought it back on the next day to the defendant, who paid him for his work. On behalf of the defendant it was contended, that the plaintiff had, under the circumstances, never paid for the goods. *Sed Per Cur.* If the defendant had agreed to take the notes as payment, and to run the risk of their being paid, that would have been considered as payment, whether the notes had or had not been afterwards honoured; but without such agreement, the giving of the notes is no payment. According to all the cases that have been determined on the subject of stopping goods *in transitu*, these goods were only *in transitu*, for there had been no complete delivery to the plaintiff; there was no final transfer of the goods to the plaintiff, for as long as they were in the hands of the engraver, who was employed by the defendant, they were at the most only *in transitu*, and the price not being afterwards paid, the defendant had a right to retain them.

5. *FENNY v. HARRISON*. T. T. 1789. K. B. 3 T. R. 757. S. P. *BANK v. NEWMAN*. 1 Lord Raym. 422; 12 Mod. 241; 1 Com. 57. *FYDELL v. CLARK*. 1 Esp. 447.

A delivery made by way of sale of a bill or note creates no liability upon the party selling, unless he knew at the time that it was of no value.

Action of *assumpsit* for money lent, &c., paid, &c., to the use of, &c. and had and received by the defendants. The facts were; that a bill of exchange was drawn by Livesy and Co. on Gibson and Johnson, in favour of one N., which came by indorsement to the defendant, who being desirous of getting it discounted, employed one F. H. for that purpose, telling him to carry it to market, and get cash for it; but that he would not indorse it. F. H. applied to his brother, J. H., to get the bill discounted, informing him that it was the defendant's bill; and that, though he did not choose to indorse it, yet, he added (as a reason of his own), that as their number was on the bill, it was equivalent to an indorsement, and that he, F. H., would indemnify him if he indorsed the bill. On an application by J. H. to the plaintiffs, and on his indorsing the bill, without which indorsement he could not have got the bill discounted, the plaintiffs discounted it, chiefly relying on the credit of Gibson and John-

son. for at that time they did not know that the defendant had any concern with the bill. Afterwards, however, on the failure of Gibson and Johnson, the plaintiffs having heard that the bill had passed through the defendants' hands, applied to him for payment, who at first refused, but afterwards promised to take it up; and on his not doing so, the present action was brought to recover the amount of it. The plaintiff had a verdict, and, on a new trial, a second verdict; after which a rule was obtained to show cause why the second verdict should not be set aside, and a new trial granted, on the ground that this was a *nudum pactum*. On the arguing of this case, Lord Kenyon, C. J., contrary to the opinion of the other judges, declared, that although he entertained considerable doubt upon the subject, yet the leaning of his mind was in favour of the verdicts; he observed, that if the holder of a bill of exchange sent it to market without indorsing his name upon it, neither morality nor the laws of this country would compel him to refund the money for which he had sold it, if he did not know at the time that it was not a good bill; if he knew the bill to be bad, it would be like sending out a counter into circulation, to impose upon the world, instead of the current coin. See *ex parte Shuttleworth*, 3 Ves. 368.

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6. *HORNFLOWER v. PROUD*. II. T. 1819. K. B. 2 B. & A. 327.

The plaintiff in this case exchanged three bills with a country banker for another drawn upon a house in London, but unaccepted. Acceptance was afterwards refused, and an action of trover was brought to recover the three bills. The Court held, that the exchange being absolute, and not conditional, the only effect of the non-acceptance was to remit the party to his remedy by action, but not to vest in him the property in the other bills, which had passed by the exchange, although they intimated that had the country banker, at the very time of the exchange, been aware that the bill which he drew would have been dishonoured, the transaction would have been vitiated by the fraud.

7. *EMLY v. LYE*. H. T. 1812. 15 East. 13.

Per Bayley, J. If a person buys goods of another, who agrees to receive a certain bill in payment, the buyer's name not being on it, and that bill be afterwards dishonoured, the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction. It has been so held, and I can see no difference where money instead of goods is given for the bill.

8. *FIDELL v. CLARKE*. H. T. 1796. 1 Esp. 447. *S. P. BANK OF ENGLAND v. NEWMAN*. 1698. 1 Ld. Raym. 442.

Action for money had and received. The plaintiffs, it appeared, had kept cash with the defendant's bankers, and the latter had discounted bills for the plaintiff, who had received, instead of cash, bills for the amount, which the defendant had not indorsed, but only delivered over to the plaintiffs. Per Lord Kenyon, C. J. The plaintiffs having taken the bills without indorsement, have taken the risk upon themselves. The bankers were the holders of the bills, and by not indorsing them have refused to pledge their credit to their validity, and the plaintiffs must be taken to have received them on their own credit only. This action, therefore, cannot be sustained. Plaintiff non-suited.

Or when made by way of exchange for another bill the assignee has no right of action against the assignor, in case the bill turns out to be of no value;

Or the party expressly agrees to take it in payment, and run all risks.

As where bankers, in discounting a bill, give their customer bills or notes without indorsing them, which turn out to be bad, the bankers are not liable.*

The holder of a lost bill for a

XII. RELATIVE TO BILLS AND NOTES WHICH HAVE BEEN LOST. See also post, tit. Check.

1. *GRANT v. VAUGHAN*. T. T. 1763. K. B. 3 Burr. 1516. S. C. 1 Blac. 485. S. P. *LAWSON v. WESTON*. T. T. 1801. K. B. N. P. 4 Esp. 56 S. P. *ANDON*. H. T. 1700.* K. B. N. P. 1 Ld. Raymond. 738.; S. C. 1 Salk. 12; S. C. 3 Salk. 71.

The defendant, on the 22d of October, 1763, drew a bill in London on A.

* And in *ex parte Shuttleworth*, 3 Ves. 368. where N gave the bankrupt before his bankruptcy cash for a bill, but refused to allow the bankrupt to indorse it, thinking the bill better without his name, he proved the amount under the commission; and on petition to have the debt expunged, the Chancellor granted the application, observing that this was a sale of the bill.

valuable consideration, who is ignorant of the circumstance;

and Co. for 70*l.* payable to ship Fortune, or bearer, which he gave to B., the ship's husband, who lost it. It was found by a person unknown, who, on the 25th of October, paid it to the plaintiff, a grocer in Portsmouth, for a parcel of teas, and took the change, having first made inquiry, and found that the drawer was a responsible person; in the mean time defendant directed A. and Co. to stop payment of this bill, which produced this action. On the trial Lord Mansfield, C. J. left it to the jury to consider, 1st, whether the plaintiff came to the possession of the bill fairly and *bona fide*; 2dly. whether such a draft was, in fact and practice, negotiable; and the jury, which was a special jury of merchants, found for the defendant. But, upon an application for a new trial, the Court were clearly of opinion, that the second point ought not to have been left to the jury, because it was clear that such drafts were negotiable; and if the jury thought the plaintiff took the note fairly and *bona fide*, of which there appeared to be no doubt, he was entitled to recover, and a new trial was granted. See ante, vol. iii. p. 394.

And receives it before it becomes due from the finder, may recover thereon.*

[421] But if the drawee pay it after notice of its loss, he will be responsible to the loser, notwithstanding such payment, unless the holder obtained it *bona fide*.†

And where the purchasers of goods paid for them by a bill indorsed in blank, in an amount greater than the debt, and the vendor paid the difference, and the bill was lost in its transmission, the Court held that the vendor could not recover for the bill or the goods.

2. *GOOD V. COX.* Cited *BOEHM V. STERLING*. M. T. 1797. K. B. 7 T. R. 427. The plaintiff had taken the note on which he sued for a valuable consideration three months after it was due. It appearing that the note had been lost by the true owners, and that the person from whom the plaintiff received it had notice of this, Lord Kenyon, C. J. held that the plaintiff was not entitled to recover.

3. *LOVELL V. MARTIN.* E. T. 1813. C. P. 4 Taunt. 799.

Plaintiff lost a bill accepted, payable at defendants, and immediately gave notice thereof to the acceptor, and the acceptor communicated the notice to the defendants, with a request that they would not pay or discount the bill. They afterwards (through inadvertence) discounted it for one Powell, who had it from a child who picked it up. When due, they wrote a receipt upon it, and debited the acceptor with the amount. Plaintiff brought trover; and there being no proof that Powell took it *bona fide*, or paid value, the plaintiff had a verdict. A rule was obtained to set it aside on the ground that there had been no conversion; but the Court held, that the writing a receipt upon it, and debiting the acceptor with the amount, was a conversion.

4. *CHAMPION V. TERRY.* E. T. 1822. C. P. 7 Moore, 130; S. C. 1 Bing. 295.

The defendant having purchased certain goods of the plaintiff's traveller at Manchester, gave him a bill of exchange exceeding the amount of the purchase-money, and indorsed it in blank. The traveller gave the difference between the price of the goods and the amount of the bill, and inclosed it in a letter to his principals (the plaintiff's) in London. The plaintiffs did not receive the letter, and when the bill became due brought the present action. No evidence was adduced to show that the plaintiffs had made inquiry for, or advertised the bill. The Court entertained an opinion that sufficient assiduity had not been used to recover the bill; but, independently of those grounds, the plaintiff had taken the bill absolutely, and though they might have lost the instrument, the defendant was still liable to be called on by any *bona fide* holder of the bill.

5. *SMITH V. SHEPHERD.* H. T. 1775. K. B. Sel. Ca. 243.

The defendant was indebted to Bagnal and Hand, the bankrupts, in 30*l.* for

* It being a general rule that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such third person to occasion the loss must sustain it; 2 T. R. 70. Therefore, even if a person who has not given a consideration for a lost or stolen bill transferable by delivery present it to the drawee at the time it is due, and he pays it before he has notice of the loss or robbery, such drawee will not be liable to pay it over again to the real owner; Poth. 168-9.

† Hence the holder of a bill, especially when transferable by mere delivery, should, in case of loss, immediately give notice of the accident to the acceptor and all parties thereto; Poth. pl. 132; and issue public notices, in order to prevent any person from taking it; Beawes. pl. 179; the latter, however, is unavailable, unless knowledge of such notification can be brought home to the person receiving the instrument; *Lawson v. Weston*, 4 Esp. 56. The party losing the bill must give notice of non-acceptance and non-payment to the drawer and indorsers, as in other cases, for otherwise he will lose his remedy against them; *Thackray v. Blackett*, 3 Campb. 164. abridged post.

goods sold and delivered in October, 1774. Comberstall, the bankrupt's servant, brought a bill of parcels in the same handwriting that all their former bills had been, and fraudulently said his master was in want of cash, and desired he would accept a bill of exchange, which C. immediately drew, signed with his own name, payable to Bagnall and Hand, or order, and gave a receipt on the bill of parcels. The defendant accepted the bill, and C. afterwards carried it away. The bill was brought to the defendant by Spencer, who had it in payment for goods. The names of Bagnall and Hand were indorsed on the bill, and the defendant paid it, but that indorsement was a forgery. It was the bankrupt's practice to deliver in their bills at Christmas; but at Christmas, after this transaction, no bill was delivered to defendant. No evidence appeared in whose handwriting the indorsement was, but it did not appear like the bankrupt's or Comberstall's. *Per Cur.* Each party is innocent. The question is, on whom the loss must fall? It should be on him who is most in fault. It is admitted that Comberstall used to receive money, but not draw bills. Here is a bill that does not trust Comberstall at all, for it is to pay to the order of the bankrupts. In this case, if he had been used to draw bills, that would not vary the case; because it is not pretended that the indorsement was by Comberstall; then he that takes a forged bill must abide by the consequence; for the man whose name is forged knows nothing of it. If a bill, payable to bearer, be lost, and found by another person in the street, who carries it to a banker, who drew it, and he pays it, it is a good payment, for it is the owner's fault that he lost it. In this case the name of Bagnall and Hand is forged. It could not be paid without their hand; and defendant has been negligent in inquiries whether it was their hand or not. The ground which defendant relies on is, that the bill was not delivered at Christmas, as usual; but that is of no weight, because it had been delivered before, in October.—Verdict for plaintiff.

Where the bill is only assignable by indorsement, a person getting possession of it by a forged indorsement, will not acquire any interest in it, though he was not aware of the forgery.

6. *PIERSON v. HUTCHINSON*. T. T. 1809. N. P. 2 Camp. 212; S. C. 6 Esp. 126.

Assumpsit by the indorsee against the acceptor of a bill of exchange. The bill had been lost after indorsement; and plaintiff having offered defendant a bond of indemnity, it was contended plaintiff would be entitled to a verdict without producing the bill. But Lord Ellenborough said, in the absence of evidence proving the destruction of the bill, it was fair to presume the bill was in the hands of a *bona fide* indorsee for value, and in that case defendant might be called upon, and would, in fact, be liable to pay a second time; and whether the indemnity would alter the case was dubious. There had been decisions, it was true, where the indorsee of a lost bill, under the circumstances, had recovered; but the authorities on that point were so conflicting and various, and at the same time so opposed to our judicial system, that he could not venture to act upon them. See 6 Ves. 812.

7. *LONG AND OTHERS v. BAILIE*. Guildhall, 13th December, 1805. 2 Campb. 214.

* But a court of equity has jurisdiction to enforce payment of the amount of a lost bill in the hands of a *bona fide* holder, if it be a transferrable bill, but not if it were not a transferrable instrument; 1 Ves. sen. 338; 5 Ves. 238; 6 Ves. 812; 16 Ves. 430. So the bill can be proved under a commission of bankrupt, upon giving an indemnity in respect of any claim upon the bill. 6 Ves. 812.

There is, however, a proviso in the stat. 9 & 10 W. 3 c. 17. s. 8. by which it is enacted "that in case any such inland bill should happen to be lost or miscarried, within the time limited for the payment of the same, then the drawer of the said bill is and shall be obliged to give another bill of the same tenor with that first given; the person to whom it is delivered giving security, if demanded to the drawer, to indemnify him against all persons whatsoever, in case the said bill so alleged to be lost or miscarried shall be found again." It should seem that from the word "such," the statute does not extend to all bills of exchange, but only to the particular bills therein mentioned; namely, such as are expressed to be for value received, and payable after date. 1 Ves. sen. 346; 4 T. R. 170; 2 Camp. 215; but it has been observed that the equity of the statute would comprehend indorsements also, and that the 3 & 4 Ann. c. 9. which gives the like remedies upon notes, as were then in use upon inland bills, must implicitly extend the statute of William to notes; 1 Atk. 613; 1 Ves. sen. 346;

And if a bill be lost after it is indorsed, [423] no action can be supported by the real owner,* against the acceptor, though a bond of indemnity has been offered, unless the destruction of the bill can be proved.

Or it were specially indorsed to plaintiff, and no indorsement from him upon it; Or founded on a new consideration, as where defendant on plaintiff's executing a bond of indemnity, promised, &c. Or where the validity of the bill is acknowledged after to D., in its carriage to Dublin, where he resided, was lost. The drawer it was lost. And if a bill be lost, and a new bill cannot be had from the drawer, a protest may be made on a copy. [424] But if a bill be cut in two, and half lost, the holder cannot sue on the other half.

Semb. Destroying a bill is an indictable offence;

Evidence of the contents of a destroyed bill is admissible.

A bill of exchange accepted after it is due is payable on demand.

Action against the acceptor of a bill of exchange, payable to the order of the drawer, and by him *specially* indorsed to the plaintiff. It was proved that a person took the bill to have it compared with the affidavit to hold the bail; that a copy was then taken, and the bill afterwards stolen from such person. As the correctness of this copy and indorsement was proved, plaintiff had a verdict.

WILLIAMSON v. CLEMENTS. E. T. 1809. C. P. Taunt 523.

Special *assumpsit*, alleging that the defendant was indebted on a bill of exchange, and the plaintiff having lost the same, had at the request of the defendant given him a bond, acknowledging the payment, and conditioned to indemnify him against the bill in consideration whereof the defendant undertook to pay the money on request. On motion in arrest of judgment, the Court were of opinion that as the count stated a new consideration, viz. the execution of the bond, the action was maintainable.

9 HART v. KING. M. T. 1798. K. B. 12 Mod. 310.

A bill of exchange was protested and lost; and an action being brought against the drawer, it was proved that the defendant had owned he had drawn the bill. The plaintiff had a verdict.

10. DEHERS v. HARRIOT. T. T. 1690. K. B. 1 Show. 164.

Action on a bill of exchange. The bill in question having been indorsed against to D., in its carriage to Dublin, where he resided, was lost. The drawer having taken an exact copy thereof, the question was, whether a protest could be made upon a copy? The jury stated the custom to be, where a bill has been casually lost, and another could not be had from the drawer, to make a protest upon the copy. And Holt, C. J. acquiescing in this doctrine, the plaintiff had a verdict.

11. MAYOR v. JOHNSON. H. T. 1813. K. B. N. P. 3 Campb. 324.

A traveller received a country bank note, payable to bearer, which he cut in two, and sent the halves on different days by post to his employer in London; one of these was stolen; but the plaintiffs received the other. Under these circumstances, Lord Ellenborough, C. J. said, the action could not be maintained on the production of half the note, in the absence of proof that the other half had been destroyed.

XIII. RELATIVE TO BILLS WHICH HAVE BEEN DESTROYED.

1 REX v. MASON. T. T. 1725. K. B. 11 Mod. 398.

This indictment stated that a note was drawn upon the defendant; that the note was indorsed over, and the defendant accepted it; and that at St. Martin's in the fields, on such a day, he took the note from the defendant and destroyed it. A motion was made in arrest of judgment, on the ground that there is no venue laid to any of the precedent facts of drawing the note, or the defendant's accepting it. *Sed per Cur.* The offence is the same, whether the note is described or not; there is no case to support this exception; and setting out the note specially is only surplusage.—Rule refused. *Sed vide ante*, vol. 1 p. 158. n.

2. PIERSON v. HUTCHENSON. T. T. 1809. N. P. 2 Campb. 212.

In this case Lord Ellenborough held, that where a bill of exchange is destroyed, evidence of its contents is admissible.

XIV. RELATIVE TO THE PAYMENT OF A BILL OR NOTE.

(A) WITH REFERENCE TO THE TIME WHEN A BILL OR NOTE BECOMES DUE AND PAYABLE.††

(a) When the bill or note is payable on demand.†

1. JACKSON v. PIGOTT. M. T. 1698. K. B. 1 Ld. Raym 364; S. C. 12 Mod.

* It does not appear in what character the plaintiff sued; perhaps the bill had never been indorsed.

† A bill or note payable on demand is payable immediately on presentment, without any allowance of days of grace; Chit, Bills, 269. 6th edit; Bayley on Bills, 187. 4th edit.

‡ The time at which the payment is limited to be made is various, according to the

212. GREGORY v. WALCUP. T. T. 1699. K. B. 1 Com. Rep. 75; S. C. 1 Salk. 129; S. C. 1 Ld. Raym. 574; S. C. 12 Mod. 410.

In an action on a bill of exchange, it appeared that one M. drew a bill upon G. W. to be paid to the plaintiff, or order. It appeared the bill was not presented for acceptance untill after it became due; the drawee accepted according to its tenor. *Per Cur.* It is immaterial whether the party accepted the bill before or after it became due. It is a general rule that immediately the drawee puts his name to the bill, he becomes liable; we are, therefore of opinion, that as this bill was not accepted untill after it was payable, this is a general acceptance, and payable upon demand.—Judgment for plaintiff.

[425]

See 1 Salk. 127; 1 Mod. 211; 1 Ld. Raym. 364; Carth. 459.

circumstances of the parties, and the distance of their respective residences. Sometimes the money is payable at sight; sometimes at so many days after sight; at other times, at a certain distance from the date. Usance is at the time of one, two, or three months after the date of the bill, according to the custom of places between which the exchanges run. Double or treble usance, is double and treble the usual time; and half usance is half the time.

Usance between London and any part of France, is 30 days after date. Between London and the following places—Hamburg, Amsterdam; Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, is one calendar month after the date of the bill. Between London, and Spain and Portugal, two calendar months. Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months. The usance of Amsterdam on Italy, Spain, and Portugal, is two months. On France, Flanders, Brabant, and on any place in Holland or Zealand, is one month. On Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg, and Breslau, 14 days after sight, two usance 28 days, and half usance seven. Half usance, when the usance is one month, shall contain 15 days, notwithstanding the inequality in the length of the months. Where the time after the expiration of which a bill is made payable, is limited by months, it must be computed by calendar, not lunar months; thus a bill dated 1st Jan. and payable at one month after date, the month expires on the 1st February. On this account it is said in some books that where the bill is dated the last day of a month, some difficulty may arise from the manner in which that last day is expressed. on account of the inequality in the length of the months. Thus in cases of bills being payable one month after date, if the date be simply the last day, and the number of the day be not expressed, it is said the month expires the last day of the succeeding month; as if it bear date the last day of February, the time does not expire till the 31st March; but if the number of the day be expressed, the month expires on the day corresponding in number to the date; as if the day be the 28th February, the time expires on the 28th March. On the same principle it would seem, where the date is the 31st March, the time will not expire till the 1st of May, but where it is the last day of March, it expires on the 30th of April. Where one month is longer than the succeeding one, it is a rule not to go, in the computation, into a third; thus on a bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th February in common years, and in the three latter cases, in leap year, on the 29th.

The general rule of law is, that when computation is to be made from an act done, the day on which the act is done must be included; because the law, unless to prevent mischief or inconvenience, admitting no fraction of a day, the act relates to the first moment of the day, and is considered as done then. But when the computation is to be from the day itself, the natural construction of the words imports that the day must be excluded. The custom of merchants which makes part of the law of the land, being that where a bill is payable at so many days after sight, or from the date, the day of presentment or of the date is excluded. Thus, where a bill, payable ten days after sight, is presented on the 1st day of a month, the 30 days expire on the 11th: where it is dated the 1st, and payable 20 days after date, these expire on the 21st. Where there is no date, and the payment is directed to be made so many days after date, the date is taken to be the day on which it issued.

The vernal equinox, as the year was rectified by Julius Caesar, happened to fall, in the year 325, on the 21st of March. But from causes which it is foreign to the purpose of this note to explain, in 1582 the equinox having changed from the 21st to the 11th of March, Pope Gregory 13. ordered 10 days to be taken out of the calendar, and the 11th day of March to be reckoned as the 21st. This edict was generally obeyed by the nations who acknowledged his authority; but most of the Protestant countries continued the former method of reckoning their time, and from hence arose the different modes of computation, which now obtain in Europe under the denomination of old and new style. Since the days of Gregory, the equinox has receded one day, so that there are 11 days of difference between old and new style; or, in other words, the 1st day of any month, according to the old style, is the 12th according to the new.

[426]
A bill or
note paya-
ble on de-
mand, must
be present-
ed within
a reasona-
ble time
for pay-
ment.*

2. *WARD v. EVINS*. H. T. 1702. K. B. 2 Salk. 442. S. C. 2 Lord Raym. 928; S. C. Com. 138.

This note being payable on demand, the Court held, that the party receiving such note should have a reasonable time to present it for payment; such as the next day; he not being obliged, as soon as he receives it, to go straight for the money. See 6 East 4, 8, 9; 9 East. 347.

3. *MANWARING v. HARRISON*. H. T. 1722. At Guildhall. 1 Stra. 508.

Two days
were hold-
en not to
be unreason-
able but
11 days
were.

On the 17th of September, being Saturday, about two in the afternoon, Harrison gave to Manwaring in payment, a note for 100*l.*, signed by Mitford and Mertins, goldsmiths, dated the 6th of September, payable to Harrison or order. The same afternoon, Manwaring paid away the note to J. S.; Mitford and Mertins paid all Saturday and Monday, and on Tuesday morning, as soon as the shop was opened, and before any money was paid, J. S. came and demanded the money, but Mitford and Mertins stopped payment. Manwaring paid back the money to J. S., and demanded it again of Harrison; who refusing to pay it, an action was brought; and on *non assumpsit* pleaded, Pratt, C. J. told the jury, that giving the note is not an immediate payment, unless the receiver does something to make it so, by neglecting to receive the value in a reasonable time, by which he gives credit to the maker of the notes. He left it to them whether there had been any neglect, and observed, that the note was payable to Harrison, who had kept it 11 days, and probably would not have demanded it sooner than Manwaring did, it appearing the goldsmiths were in full credit all the while. The jury desired they might find it specially, and leave it to the Court, whether there was a reasonable time; but the Chief Justice told them they were judges of that; whereon they found for the defendant; and declared it as their opinion, that a person who did not demand a goldsmith's note in two days, took the credit on himself.

TURNER v. MEAD. H. T. 1720. K. B. 1 Stra. 416. S. P. *MOORE v. WARREN*.

Old style now prevails in Muscovy, Denmark, Holstein, Hamburg, Utrecht, Gueldre, East Friesland, Geneva, and in all the Protestant principalities of Germany, and the cantons of Switzerland.

New style, in all the dominions subject to the crown of Great Britain, in Amsterdam, Rotterdam, Leyden, Haerlam, Middleburg, Ghent, Brussels, Brabant, and in all the Netherlands, except Utrecht and Gueldres; and in France, Spain, Portugal, Italy, Hungary, Poland, and in all the Popish principalities of Germany and the cantons of Switzerland.

Where a bill payable at a certain time from the date is drawn at a place using one style, and remitted to a place using the other, the time is to be computed according to the style of the place at which it is drawn. Thus, on a bill payable the 1st of March old style, and payable here one month after date, the month is to be reckoned from the 12th of March, because that day, according to the new style, corresponds to the 1st according to the old.

Sometimes the drawer of a bill makes the date according to the old and new style, writing the one above and the other below, a small line drawn in the centre, thus:

18 ————— March 23

29 ————— April 8

Where a bill is payable at a time after sight, there can be no difficulty; the time must evidently be computed according to the style of the place where it is payable.

* Whether it is the province of the Court, or of the jury, to decide upon the reasonableness of the time within which a check, &c. payable on demand, should be presented for payment, has been disputed. Formerly it was thought that it was a question for the jury; but the decisions, even of mercantile juries, were found so much at variance with each other, that for the sake of certainty on the subject it is now settled, that the reasonableness of the time for presentment is partly a question of fact, and partly of law; the jury are to find the facts, such as the distance at which the parties are from each other, the course of the post, &c.; but when those facts are established, the reasonableness of the time is a question of law, upon which the judge is to direct the jury; see 2 Taunt. 394; 1 T. R. 168; 3 B. & P. 599; 6 East. 10; 7 East. 386. This doctrine, though formerly by no means universally assented to; Doug. 515; 2 H. Bl. 568; 1 Blac. Rep. 1; is founded upon the soundest principles of law; 6 East. 10; it is sanctioned also by expediency, for while the old practice prevailed in some cases, the keeping of a check or bill, payable on demand, three, four, or five days, was holden not too long; 2 Freem. 247; and in others, that it should be made the day the bill was received, and that even an hour was an unreasonable time; 1 T. R. 186; 1 Blac. 1; Beawes. 229; see cases *supra*.

H. T. 1720. K. B. 1 Stra. 415. S. P. FLETCHER v. SANDYS. H. T. 1746. K. B. 2 Stra. 1248. S. P. WARD v. EVANS. T. T. 1702. K. P. 2 Ld. Raym 928. S. P. HOAR v. D. COSTA. T. T. 1732. K. B. 2 Stra. 910.

The defendants paid the plaintiffs, who were the Sword-blade Company, two goldsmiths' notes, at three in the afternoon; the plaintiff's servant next morning leaves the notes with the goldsmiths, in order to have the money ready for him as he came back a clearing, it being, as they proved, customary for the Bank and Sword-blade Companies to send out their notes in the morning, and then call for the money as their servant returned in the evening; and the goldsmiths, on receiving the notes, always cancelled them, and got the money told out against the time it was usually called for. The notes in this case were brought early in the morning, and received and cancelled; and between four and five in the afternoon, the servant who left them called again for the money, when the goldsmiths had just stopped payment; on which the servant takes new notes of the same tenor and date as the cancelled ones he left in the morning. And because the plaintiff's servant had done nothing but what was usual in leaving the notes, instead of taking the money when he first called in the morning. *Pratt, C. J.* directed the jury to find for the plaintiffs, which they did.

Though the usual time allowed was 24 hours.

5. APPLETON v. SWEETAPPLE. M. T. 1782. K. B. Bayley on Bills, 192; Chit. Bills, 272. n.

Juries have endeavoured to establish, that it must be presented the day it is received; [428]

In this case it appeared that plaintiff received from the defendant a banker's note at one o'clock in the day, but did not call for payment the whole of that day, and in the evening of it the banker failed. A verdict was found for the defendant, on the ground that it was the custom of the city that bills should be brought for payment the day they are received; but on a motion for a new trial, it appearing that there were many exceptions to this custom, as in the case of factors at Bear Key, the salesman at Smithfield, and others, the Court held that it was not sufficiently proved; and even if the decision had been on that ground, it must appear that the custom was reasonable, or the Court would control it, and therefore a new trial was granted; the jury found for the defendant against the direction of the judge; and second new trial was granted the jury again finding for the defendant, the Court refused to interfere.

6. THE EAST INDIA COMPANY v. CHITTY. M. T. 1743. K. B. 2 Stra. 1775.

Or at the latest the next morning.

At half-past eleven in the morning of the 18th of January, the defendant paid the East India Company's cashier a banker's note, and they did not send it for payment till the next day at two, at which time the banker stopped payment. The question was, who should bear the loss? And upon examining the merchants, it was holden that the Company had made it their own note by not sending it out the afternoon they received it, or at farthest the next morning. The jury therefore found for the defendant.

7. POCKLINGTON v. SILVESTER. T. T. 1816. C. P. Cited Chit. Bills. 274. 6th. edit.

But it is now settled, that the presentment may be made at any time during the next day.*

Action for the amount of a check given by the defendants to the plaintiffs; the defendants drew the check on their bankers, Mainwaring and Co. which was paid to the plaintiff: at eleven o'clock in the morning, on the 16th of November, 1817, which was not presented till, near five o'clock on the 17th and the defendants had notice thereof that evening. As the jury, however, contrary to the direction of the judge, found for the defendants, a rule was obtained, and a new trial granted; and upon the second trial, Burroughs, J. directed the jury to find for the plaintiff, saying, that whatever doubts had been formerly entertained, it was now established as a rule of law that the party receiving a check on a banker has the whole of the banking hours of the next day to present it for payment; the jury accordingly found for the plaintiff.

* It has been holden that a bill or note of this kind, given by way of payment to a banker, must be presented by him as soon as if it had been paid into his hands by a customer; 1 Blac. Rep. 1; and that if such a bill or note be paid into a bankers; and be payable at the place where the banker lives, it must be presented the next time the bankers clerk goes

And where country bank notes, payable in London, were given in the country, it was holden that [429] the holder had not been guilty of laches, by not sending them to London till the next day.*

If a bill be payable a broad, it is not necessary to send it by the first opportunity to the place where it is payable.

Formerly on a bill payable so many days after sight, the day of sight was included.

[430] But the rule is now altered.

8. WILLIAMS v. SMITH. E. T. 1819. K. B. 2 B. & A. 496.

At ten o'clock on Friday morning, defendant paid plaintiff at Wantage (18 miles from Newbury,) 450*l.* in Newbury bank notes, payable at Newbury or London. Plaintiff sent them to the Wantage bank the same day, to remit to London, but they declined on account of the risk, and halves of them were sent to London by Saturday's coach, and the other halves by Sunday's post. They were presented for payment on the Tuesday, but no Newbury notes were paid in London after the Monday, nor at Newbury after the Saturday. Newbury is a two day's post from Wantage, and the post for London leaves Wantage at half-past five in the evening. On a case reserved, it was urged for defendant, that plaintiff should have sent the notes to London by the Friday's post, or if not that they should have been presented for payment the day they arrived in London, in either of which cases they would have been paid. But the Court held, that the plaintiff had till the day after they were received, that was, till Saturday, to send them to London, and the banker there had till the day after he received them, that was, till Tuesday, to present them; and *postea* to plaintiff.

9. MULLMAN v. D'EGUINO. M. T. 1795. C. P. 2 H. Bl. 565. S. P. GOURY v. HERDEN. Holt. 342; 7 Taunt. 159; 2 Marsh. 454.

To an action of debt on bond, conditioned to pay certain bills drawn in India, at sixty day's sight, in case they should be returned protested; defendant pleaded that he had not notice so soon as he should have had. It appeared that notice was sent by the first English ships, but that by the accidental conveyance of a foreign ship, not bound for England, and by which the holder wrote to England upon other matters, notice might have been sent sooner, and would have arrived sooner. But Eyre, C. J. told the jury that notice by the first regular ship bound for England was sufficient, and that it was not necessary to send notice by the chance conveyance of a foreign ship. The jury found for plaintiff; and on motion for a new trial, the Court was satisfied with the verdict, and refused the rule.

(b) *When the bill or note is payable at sight.*†

1. BELLASES v. HESTER. M. T. 1696. K. B. 1 Lord Raym. 280; S. C. Lutw. 1591.

Upon a bill payable 10 days after sight, Treby, C. J. was of opinion that the day on which the bill was seen by the drawee was not to be reckoned one of the 10, because then a bill payable one day after sight would be payable the day it was seen; but Powell and Neville, Js. held the contrary, and judgment was given according to their opinion.

2. COLEMAN v. SAYER. K. B. Barnard. Rep. 303; S. C. 2 Stra. 829.

In an action upon a bill payable six days after sight, one question was, whether the day of sight was to be reckoned one of the six, and Raymond, C. J. said it was not, and the modern practice is consistent with this opinion.

(c) *When the bill or note is payable after date.*

When a bill is made payable at a month or months after date, the computation must in all cases be by *calendar* and not by *lunar* months. Thus, on a bill or note payable one month after date, and dated the 1st of January, the month will not expire till the first of February; and with the addition of days his rounds; but it should seem in all cases that it suffices for a banker to present such check the day after he receives it; 2 Camp. 537.

* If a bill or note, payable on demand, be payable elsewhere than in the place where it was given, it is laid down that the party receiving it, must forward it for payment by the post the next day after he receives it; Bayley, 104; although that post may go out on the same day. But from other cases it should seem that it should suffice if such bill or note were forwarded for payment by the regular post on the day after it was received; 2 Campb. 537; 2 Taunt. 388. It is certain, however, that the holders not forwarding such bill or note for payment by the post, or some conveyance of the day after it was received, would be deemed laches.

† It has never been decided that days of grace are allowable on bills payable at sight; see Chitty on Bills, 269. 6th edit. Bayley on Bills, 42. 109. 110. 3d edit. But Mr. Selwin in his Nisi Prius Abridgment, 353, observes that the weight of authority is in favour of such allowance; 5th edit.

of grace, the bill is payable on the 4th of February, unless that be a Sunday, and then on the 3d. When one month is longer than the preceding one, as where the bill is dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases in leap year, on the 29th. See ante, p. 424 n.

(d) *Of the allowance of days of grace.*

1. **BROWN v. HARRADEN.** H. T. 1791. K. B. 4 T. R. 148.

Action by indorsee against indorser on a promissory note, dated the 13th of September, 1789, and payable the 2d of November. The declaration stated a presentment and refusal on that day. The defendant pleaded a tender on the 5th; and the plaintiff replied, a bill of Middlesex sued out on the 4th. Rejoinder, that the defendant was not liable to pay at the time the bill of Middlesex was sued out. Surrejoinder, that he was. On demurrer, and joinder thereon, the question was, whether three days were to be allowed on promissory notes; the Court were of opinion, that three days' grace should be allowed on promissory notes, since the effect of the statute 3 & 4 Anne. c. 9. was, that notes were wholly to assume the shape of bills; and that the cases cited, *Tinall v. Brown*, 1 T. R. 167; *Heyden v. Adamson*, 2 Burr. 676; and *Grant v. Vaughan*, 3 Burr. 1524; showed clearly that the Courts of Westminster had thought the analogy between bills and notes so strong, that the rules established with respect to the one ought to prevail with respect to the other, that the language of the preamble of the act was express, that it was the object of the legislature to put notes exactly on the same footing with bills, and that the enacting part pursued the intention.

The rule allowing days of grace on [431] bills applies also to promissory notes.*

2. **SMITH v. KENDALL.** M. T. 1794. K. B. 6 T. R. 123.

In an action for money paid and lent, the defendant pleaded the statute of limitations; and he replied a *latitat* sued out on the 26th of September, 1793. A note given in evidence, dated the 25th of June, 1787, and payable to the plaintiff three months after date, but it was not payable either to order or to bearer; and the Court, on consideration, held that it was a good note within the statute, that it was entitled to three days' grace, and that consequently the statute of limitations did not begin to run until those three days had expired, which was on the 28th of September, 1787, and therefore within six years of the 26th of September, 1793. See 1 Show. 4; 1 Stra. 264; 3 Wils. 207; 10 Mod. 316; 2 Wils. 353; 2 Stra. 1211; 4 T. R. 148.

Even though the note be not payable to order or bearer.

3. **GOLDSMITH v. SHEE.** M. T. 1799. C. P. Cited Bayley on Bills. 199. 4th edit.

A bill for 500*l.* drawn on Katter at Hamburgh, at three usances, was dated the 25th of June, 1799; it was presented for payment on the 4th of October, which was a post day. In an action by the indorsees against the payee, the defence was, that the presentment was improper; but it was proved in evidence, as the settled usage at Hamburgh, that although it is usual to pay bills on the day they become due, the holder may, if he pleases, keep them a cer-

It has been holden, that there are 11 days of grace on a bill drawn at Hamburgh; and if the last day of grace be not a post day, the presentment should be made on the preceding post day.

* A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a little time for payment beyond the term mentioned in the bill, called days of grace. But the number of these days varies according to the custom of different places; Great Britain, Ireland, Bergamo, and Vienna, 3 days; Frankfort, out of the time of the fair, four days; Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremberg, and Portugal, six days; Dantzic, Koningsberg, and France, 10 days; Hamburgh and Stockholm, 12 days; Naples, eight; Spain, fourteen; Rome, fifteen; and Genoa, thirty; Leghorn, Milan, and some other places in Italy no fixed number. Sundays and holidays are included in the days of Koningsberg and France; But not at Venice, Cologne Breslau and Nuremberg. At Hamburgh, the day on which the bill falls due makes one of the days of grace, but it is not so elsewhere.

On bank post bills payable after sight, it has been said no days of grace are allowed; *Levl.* 247. But whenever a bill is drawn payable to the excise, it is also said that they usually allow six days beyond the three days of grace, if required by the acceptor, on payment of one shilling to the clerk at the expiration of the six days, for his trouble; and in a case where the commissioners of excise, being the payees of such a bill, gave the drawee the above time, Lord Mansfield decided, that as this custom was a general one, engrafted on such bills, and known universally, the drawer was not discharged by the above indulgence to the drawee; *Welkin v. Hankin*, cited *Chitty on Bills*, 266.

tain number of days, called respite days; and that the number of respite days is 11 where the 11th is a post day but where the 11th is not a post day, the respite days extend to the preceding post day only, the holder being obliged at his peril to protest, and send off the protest by the 11th day.—Verdict for the plaintiffs.

Though the latter proposition has been, perhaps, correctly doubted. [432]

4. *GOLDSMITH v. BLAND*. E. T. 1800. C. P. Cited Bayley on Bills. 199. 4th edit. A bill for 998l. 9s. 9d. drawn on Treviramus of Bremen, but payable at Hamburgh, at three months, was dated the 15th June, 1799; it was not presented or protested until the 7th of October, which was not a post day. In an action on these bills against the defendants as indorsers, it was proved that it was optional in the holder of a bill at Hamburgh, whether he would present and protest it on the post day before the 11th day after the day limited for its payment, the 11th not being a post day, or whether he could keep it until the 11th; and one witness proved, that where the drawer lived at Lubeck or Bremen, it was the constant usage to keep the bill until the 11th, whether it was a post day or not, there being posts from Lubeck and Bremen to Hamburgh every day.—Verdict for the plaintiffs.

5. *TASSELL v. LEWIS*. H. T. 1700. K. B. N. P. 1 Lord Raym. 743.

In England, * if the third day of grace happen to be a Sunday, or day of public rest, the presentment ought to be made on the second day of grace. The custom with regard to foreign bills of exchange is, that three days are allowed for payment of them; and if they are not paid on the last of the three days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest it the last of the three days, which are called the days of grace there, although he on whom the bill is drawn, fails, the drawer will not be chargeable, for it shall be reckoned the holder's folly that he did not protest, &c. But if it happens that the last of the three said days is a Sunday, or a great holiday, as Christmas day, &c. on which no money is usually paid, there the party ought to demand the money on the second day; and if it is not paid, he ought to protest the bill the said second day; otherwise it will be at his own peril, for the drawer will not be chargeable. The evidence in this cause being merchants, swore the custom of merchants to be such, which was approved by Holt, C. J.

6. *WIFFEN v. ROBERTS*. H. T. 1795. K. B. N. P. 1 Esp. 263.

But in other cases, a demand on the second day is a nullity. Action against the drawer of a bill dated the 1st of November, 1793, payable three months after date. To prove a presentment to the acceptor, the plaintiff called the notary; and he proving that the demand had been made on the 3d of February, 1794, Lord Kenyon, C. J. ruled the demand unavailable, inasmuch as the bill did not become due until the 4th, after allowing the three days' grace.

Presentment to the acceptor or maker for payment is essential, in order [433] to charge the drawer or indorsers of a bill or note, but a presentment to the drawer of a bill is unnecessary.†

(3) WITH REFERENCE TO THE PRESENTMENT OF A BILL OR NOTE FOR PAYMENT.
(a) *When requisite, and what circumstances will dispense with presentment.*

1. *HEYLYN v. ADAMSON*. M. T. 1758. K. B. 2 Burr. 671; S. C. 2 Kenyon. 379. *Contra*, *COLLINS v. BUTLER*. H. T. 1737. K. B. 2 Stra. 1087. S. P. *ANON*. M. T. 1691. K. B. 3 Salk. 70; S. C. 1 Salk. 126.

This was an action on an inland bill of exchange, drawn by R. C. and directed to W. D. dated the 13th of March, 1756, by which bill the said R. C. required the said W. D. to pay to the defendant, or his order, 100l. at 40 days after date, value received, as advised by the said R. C. which bill was indorsed by the defendant to the plaintiffs, and was accepted by the defendant, but not paid by him.

* Ireland and France; 39 & 40 Geo. 3. c. 42; Amsterdam, Rotterdam, Antwerp, Middelburg, Dantzic, and Koningsburg; Sunday and holidays are always included in the days of grace; but not so at Venice, Cologne, Breslau, and Nuremberg.

† A distinction was formerly taken between a bill of exchange given in payment of a precedent debt, and one given for a debt contracted at the time the bill was given; see 7 T. R. 581; in the latter case it was always holden, that the person who received it must have used due diligence to obtain the money from the drawee, and that in default of his so doing, he could not support any action against the party from whom he received it; but in the former case, the bill was not considered as payment, unless the money were actually paid by the drawee, although the holder might have neglected to present it for payment, or to give notice of non-payment; and the holder, though he could not sue on the bill, might

On the trial the plaintiffs proved that the said R. C. made the bill, and that the defendant indorsed it to the plaintiffs, that the said defendant accepted the bill, and afterwards refused payment, and that on the day it became payable. the plaintiffs caused it to be protested for non-payment, and soon after brought this action. It not being proved. on the trial that the drawer of the bill had any notice of such non-payment, or that any demand of the money had been made on him before the commencement of this action, it was objected, "that the action would not lie against the defendant. (who was the indorser of the bill) till a demand of payment had been made on the drawer, and as no such demand was proved by the plaintiffs, they ought to be nonsuited. A verdict was given on the first count for the plaintiffs for 100*l.* damages, and 40*s.* costs, subject to the opinion of the Court on the question, whether, in an action brought on an inland bill of exchange, by the indorsee against an indorser, no evidence being adduced of notice to the drawer of the bill, or of making any inquiry after him, was a ground of nonsuit. After argument, Per Cur. We are all clearly of opinion, that in actions on inland bills of exchange, brought by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get, the money from the drawee or acceptor, but need not prove any demand of the drawer. And that in actions on promissory notes, brought by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get, the money from the maker of the note.—*Postea* to the plaintiff.

2. HOLMES v. KERRISON. E. T. 1810. C. P. 2 Taunt. 323.

This was an issue directed by the Court of Chancery. It appeared that the defendant, on receiving a deposit of certain moneys from the plaintiff, gave him his promissory notes, payable after sight. The statute of limitations was offered as a defence; but it not appearing that the notes had been presented for payment for the space of six years previous to the commencement of the action, and it being surmised, from the circumstance that no entry of these notes as paid appeared in the books of the defendant, who was a banker, that they had been paid, the jury found for the plaintiff. The Court said, that until the presentment of a note payable after sight, no debt or cause of action accrued to the holder; and being of opinion, on the evidence adduced, that such presentment had not been made, refused a rule for a new trial.

3. RUSSEL v. LANGSTAFFE. M. T. 1780. K. B. 2 Doug. 515.

Per Lord Mansfield, C. J. It is no excuse for not making a demand of payment, that the acceptor has become a bankrupt, as many means may remain of obtaining payment; as by the assistance of friends.

4. ESDAILE v. SOWERBY. E. T. 1809. K. B. 11 East. 117.

Per Lord Ellenborough, C. J. It is too late now to contend, that the insolvency of the acceptor or drawer dispenses with the necessity of a demand of payment.

5. COLLINS v. BUTLER. H. T. 1737. K. B. 2 Stra. 1087.

A note was payable on the 27th of December, 1732. The drawer shut up his house, and went away the November before. The question was, whether a general demand on the drawer is necessary before the indorser can be charged to maintain an action for the consideration on which it was given; 12 Mod. 203; 1 Salk. 124; 12 Mod. 403; This distinction, we have seen, does not any longer exist; Ball N. P. 182; Kyd. on Bills, 172; *ante*, p. 417.

* So the death of the acceptor of a bill or maker of a note will not dispense with the presentment. So if the holder of a bill at the time it becomes due, be dead, his executor although he have not proved the will, must present it to the drawee; Poth. pl. 146; Molloy b. 2 c. 10 pl. 24; Mar. 134. If the drawee goes abroad leaving an agent in England, with power to accept bills, who accepts one for him, the bill, when due, must be presented to the agent for payment, if the drawee continue absent; 2 Taunt. 206. When a bill, transferable only by indorsement, is delivered to a person without being indorsed, he should nevertheless present the bill for payment to the acceptor, and offer an indemnity to him; and if the acceptor then refuse to pay, the bill should be protested for non-payment; Poth. pl. 146. It has been holden, that if a draft be given, which ought to be, but is not stamped, it is not necessary to present it for payment; 4 Taunt. 288; 1 Esp. 129; *post tit.* Check.

face to present it there only: the holder must attempt to find him out.

ged; and if it was, whether in this case the plaintiff had shown sufficient in proving the shutting up the house. As to the first point, Lee, C. J. said that a demand on the drawer was necessary; and in this particular case, he held that the plaintiff had not gone far enough, but ought to show that he had inquired after the drawer, or attempted to find him out. The point that the indorser cannot be charged until a demand has been made on the drawer; see ante, p. 433, is not law.

Alleging that the maker of a note wholly ceased, declined, and refused to pay it, is of no avail* [435]

6. *BOWES AND OTHERS v. HOWE*. T. T. 1813. Ex. Ch. 5 Taunt. 30; *Reversing Howe v. BOWES*. T. T. 1812. K. B. 16 East. 112.

The declaration in an action on a bill of exchange stated, that the plaintiff in error, at Workington bank, that is to say, at, &c. in, &c. by their promissory note promised to pay to A. B. or bearer, a certain sum; and that after the making, and before payment thereof, the said note was indorsed to the defendant in error; by means, &c. he became entitled to receive, and the plaintiffs in error became liable to pay, the sum of money so in the note specified, when requested; and after stating a promise to pay in consequence of such liability, averred, that afterwards, and before this action commenced, the defendants below and plaintiffs in error became insolvent, and then and thenceforth until and at the time, &c. "*ceased and wholly declined and refused to pay at, &c. aforesaid.*" concluding with the general breach. Plea, general issue. The evidence adduced in support of the allegation of the defendant's insolvency went to show that defendant's shop was shut up for a considerable time previous to the commencement of these proceedings, and that their payments had during that time ceased; but it was not proved that the note had been presented there for payment. The defendant in error had a verdict; on which the defendants below brought error to reverse the judgement, and assigned for error that the defendant had not, as he ought, as holder of a bill payable at a particular place, averred that the said bill was presented at the place so specified in the bill. In support of this argument, it was contended, that admitting the necessity of presenting the bill at the place particularly marked out for payment, such presentment, though not expressly stated to have taken place, must be inferred from the tenor of the declaration, to have been made; as the allegation that he wholly declined and refused to pay implied a previous request, Macdonald; C. B. said, The case rests on the effect of that allegation, for it is clear that a demand at the place is necessary, unless it be dispensed with. Now the plaintiff below has not shown to whom the refusal alleged was given; and we are of opinion, that the only construction which the terms of the averment will allow of is, that the defendants became insolvent, which is not equivalent to an averment of presentment.

But a neglect to present the drawee is waived, where the indorser has subsequently procured this laches.

7. *HADDOCK v. BURY*. T. T. 1730. 7 East. 236. n. Per Lord Raymond, C. J. "If an indorsee has neglected to demand of the drawee in a convenient time, a subsequent promise to pay by the indorser will cure this laches."

Or has made a part payment.‡

8. *VAUGHAN v. FULLER*. H. T. 1745. K. B. 2 Stra. 1246. In an action brought on a promissory note by the indorsee against an indorser, it was proved that the defendant had paid part of the money. And Lee, C. J. held this sufficient to dispense with proving a demand on the maker of the note.

MURRAY v. KING. M. T. 1821. K. B. 5 B. & A. 165.

* But in order to rebut a defence by the indorser of a bill, that the plaintiff, his indorsee had duly presented it to the acceptor, evidence of the impossibility of presenting it at the time of its maturity may be given, under the ordinary averment, that it was duly presented. *Patience v. Tounley*, 2 Smith, 223. A presentment may be dispensed with as far as regards the drawer, if he has had no effects in the hands of the drawee from the time of drawing the bill down to the time when it became due; see 3 Esp. 158; 1 T. R. 406; 3 B. & A. 619; 4 M. & S. 229; 2 Campb. 310; 12 East; 171.

† With full notice of the omission; see 16 East. 16.

‡ And if a bill be taken under an extent before it is due, and the party holding it on behalf of the crown, neglect to present it in due time, the drawer and indorser will continue liable, because no laches are imputable to the crown; West on Extents, 29. 80.

The condition of a bond, after reciting that defendants and J. S. had delivered and indorsed to the plaintiff a bill of exchange, drawn by J. S. and accepted by A. B. was, that defendants and J. S. or either of them, their heirs, &c. should pay, or cause to be paid, to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due. To an action brought thereon it was pleaded, *inter alia*, 1st, that the bill, when due, had not been presented for payment to the acceptor; and, 2d, that due notice of its dishonour had not been given to the defendants and J. S. or either of them. The Court held these pleas bad; observing, the bond, in substance, bound the defendants to pay the bill, with interest, within one month after it was due, if not then paid by the acceptor. It is admitted that that month had elapsed, and that it had not been paid by the acceptor, according to the condition of the bond; therefore the defendants are clearly answerable. It is, however, attempted by the defendant's plea to engraft upon this bond those limitations which the law imposes on holders of bills of exchange, namely, a due presentment to the acceptor, and a notice of dishonour to the drawer and indorser. We are of opinion that we ought not to do so. Had the only object of the bond been to give the plaintiff a security of a higher nature, and to make the parties liable only in case the general formalities to be observed, with reference to bills of exchange, had been complied with, we think it would have been expressed in the condition of the bond; and not finding that, we must conclude, that the parties meant to pay the bill at all events.—Judgment for plaintiff. See 8 East. 242; 2 Taunt. 206.

10. HOPLEY v. DUFRESNE. E. T. 1812. K. B. 15 East. 275.

Indorsee against indorser. The bill was accepted, payable at Hammersleys', and there was no presentment there proved till after banking hours; but after declaration delivered, defendant had applied to plaintiff for further time to pay the bill. Nonsuit, on the ground that no sufficient presentment was proved; but on rule *nisi* for a new trial, and cause shown, the Court thought it should have been left to the jury to say, whether, at the time of the promise, defendant did not know there had been no due presentment, and on that account rule absolute. See 7 East. 231. 385; 5 Burr. 2670.

11. PRIDEAUX v. COLLIER. H. T. 1817. K. B. 2 Stark. N. P. 57.

This was an action against the drawer of a bill, due the 23d of May. It appeared the plaintiff, the holder, applied to the drawee the 22d, and received in answer, that he had no effects, but the drawer would probably provide them; the next day the plaintiff saw the drawer, who said he hoped the bill would be paid; he would see what he could do, and endeavour to provide effects. The plaintiff did not present the bill that day. On the question, whether this neglect was excusable, Lord Ellenborough, C. J. held, that the circumstances did not supersede the necessity of a presentment on the day it became due, and directed a nonsuit.

12. SOWARD v. PALMER. E. T. 1818. C. P. 2 Moore. 274.

It appeared in this case, that A. having taken from the defendant a promissory note in discharge of a debt due to him from the latter, it was dishonoured; that the plaintiff, to whom it was indorsed, thereupon agreed to receive the acceptance of the defendant's brother, for a composition of 5s. in the pound on the above note, on an agreement that he should continue to hold the original note, on which his claim should revive to its fullest extent, on failure of payment of the brother's acceptance; and he gave a receipt to that effect for 11l. 10s. 6d. the amount of the bill. The brother's acceptance was not the holder paid when due; but on the following morning the sum of 12l. was tendered to the plaintiff twice, as the amount of the bill, and any expenses which the dishonour might have occasioned; but which the plaintiff refused to accept, and brought this action on the note. The jury found for the defendant, and on a rule *nisi* for a new trial, Gibbs, C. J. said that the cases cited for the plaintiff had been decided on grounds quite different from those on which the present

So application by the indorser for further time to pay the bill, is a waiver of an objection founded on a defective presentment, made with notice of the irregularity. [437] The duty of presentment is not however superseded by information, the day before the bill becomes due, that the drawer has no effects.

[436] In an action on a bond from the drawer or indorser of a bill, conditioned to pay it within a limited time after it becomes due, if the acceptor does not, it is no defence that the bill was not presented for payment, or that due notice of its dishonour was not given to the defendant.

ment that on dishonour of the latter security, his claim on the former should revive, and the bill was

question stood ; that those decisions applied to bonds to pay money at a certain day, &c. when the obligor is bound to seek out the obligee to relieve himself from the penalty in such obligation. Here the plaintiff had consented to take the composition bill in lieu of the original note, and having so done, the former instrument became subject to the law applicable to bills of exchange, and it was therefore necessary for payment to have been demanded from the defendant, as in ordinary cases.—Rule discharged.

not paid when due, but a tender of its amount and costs was made the day following, the Court held, that in an action on the promissory note, the plaintiff must prove that the amount of the bill had been demanded.

So where it is known that the defendant is only an indorser to guarantee the debt of the party who is *prima facie* liable to pay, the indorsee cannot maintain an action a

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against such indorser without having used due diligence in presenting the note as soon as it was due for payment.

But a presentment to charge the acceptor, of a bill,

13. NICHOLSON V. GOUTHIT. H. T. 1796. C. P. 2 H. Bl. 609.

Defendant and one B. undertook to guarantee an instalment on the debt of one G.'s account ; and for that purpose, G. drew notes payable to defendant at D. and Co.'s, which defendant and B. indorsed, after which they were delivered to the creditors. Before they became due, defendant inquired at D. and Co.'s if they had any effects ; and on their saying they had not, he desired them to send the notes to him, and he would pay them. Many notes were accordingly presented and paid ; but the note in question not being presented until three days after it was due, defendant refused to pay it. B. had supplied him with the money to take up all the notes, but as this was not presented when due, he had returned the money destined to pay it. In an action on the note against the defendant, Eyre, C. J. thought, as he knew the note would not be paid at D. and Co.'s, and had provided money for it, and as his indorsement was by way of guarantee, he was not injured by the delay, and that the request to send the notes to him was a waiver of notice, or notice by anticipation. But on a rule nisi for a nonsuit, the Court, Eyre, C. J. concurring, were of opinion, that though justice was with the plaintiff, yet he could not recover ; for though the indorsement was by way of guarantee, it was liable to all the legal consequences of an indorsement, and defendant's promise to pay was only to pay such note as should be duly presented at D. and Co.'s. See 2 Taunt. 206 ; 8 East. 242 ; 2 D. & R. 59. n. ; 1 B. & C. 10.

14. ANDERSON V. CLEVELAND. E. T. 1779. K. B. 13 East. 430. n.

The indorsee of a bill brought an action against the acceptor, and it appeared that there was no demand of payment until three months after the bill became due, and the drawer was then insolvent. Lord Mansfield, C. J. ruled, that this was no defence ; for the acceptor of a bill of exchange, or maker of a note, remains always liable. Acceptance is proof of having effects in his hands ; and he ought never to part with them, unless it appears that the drawer has provided another fund and paid the bill himself. See Doug. 247 ; 4 Ves. 8.

15. RUMBALL V. BALL. M. T. 1711. K. B. 10 Mod. 38.

Or maker of a note, when the instrument is payable generally, is in no case requisite.

An action of debt was brought on a note to this effect : " I acknowledge myself indebted to R. so much, which I promise to pay on demand." A motion was made in arrest of judgment, that though on a note acknowledging a debt, it was not necessary to allege a demand, yet where it is part of the agreement, there a demand is necessary. *Per Cur.* The words, promise to pay, import no more than that I am ready to pay the money at any time, and shall not restrain or qualify the other words ; this being no debt arising on the performance of a certain condition, but a debt plainly precedent to the demand. Besides, supposing the demand necessary, the action itself is a demand. See 1 Wils. 33 ; Cro. Eliz. 548 ; Prac. Reg. 538 ; 1 B. & P. 625.

(b) *At what place to be made.*

1. *As concerns Bills of Exchange.*

1. BROWN V. M. DERMOT. M. T. 1805. K. B. N. P. 5 Esp. 265.

It is sufficient if the presentment of a bill be made at the house of the acceptor.

Indorsee against indorser. It appeared a presentment had been made at the usual place of residence of the acceptor ; the question was, whether, as it had not been paid, it was a sufficient demand to entitle the indorsee to sustain an action against the indorser. Lord Ellenborough, C. J. said, it was necessary to prove a presentment of the bill, and non-payment by the acceptor ; but

that if a bill was payable at a particular house, it was sufficient to demand the money there.

2. *BEECHING AND OTHERS v. GOWER*. T. T. 1816. N. P. Polt. 313.

The plaintiff took at Tunbridge, on the 5th of March, a Kentish note, payable at Maidstone or in London. The plaintiff sent it to London on the same day, and it was presented in London on the 6th, but the parties to whom it was directed had stopped payment; the Kentish bank paid all the 6th, so that if it had been sent to Maidstone, it would have been paid. On the question, whether the plaintiff was bound to present it at the nearest place, Gibbs, C.J. said, the plaintiffs had an option to present it either at Maidstone or London, as the notes were made payable at both places.—Verdict for the plaintiff.

3. *HODGE v. FILLIS*. M. T. 1813. K. B. N. P. 3 Campb. 463. S. P.

GARNET v. WOODCOCK. M. T. 1816. K. B. N. P. 1 Stark. 475.

Indorsee against acceptor of a bill "addressed to Messrs. Fillis and Co., Plimouth, payable in London." They accepted it payable at Sir John Perring and Co.'s, London. In an action against them, the first count, in stating the bill, omitted to alledge that the address made it payable in London. Lord Ellenborough, C. J. thought the omission fatal on that count; but on proof of a promise by defendants to pay after the bill was due, he thought the plaintiff entitled to recover on the other counts.

4. *STEDMAN v. GOOCH*. E. T. 1793. K. B. N. P. 1 Esp. 3.

Assumpsit for goods sold. Defence that the plaintiff had received three several bills of exchange. To show that he had used due diligence to procure payment, he proved that he had presented them at the house of a third person, where they had been made payable, and the answer received was, no effects of the acceptor. And, Lord Ellenborough, C. J. held, that though the persons at whose house they were payable, were not parties to them, nor personally liable, yet an answer at that house as to the payment was sufficient.

5 *ROWE v. YOUNG*. T. T. 1820. C. P. 2 B. & B. 165; S. C. 5 M. & S. 291, S. C. 2 Bli. 391. S. P. *SAUNDERSON v. POWES*. M. T. 1814; K. B. 14 East 500 S. P. *DICKENSON v. POWES*. T. T. 1812. K. B. 16 East. 110. S. P. *ROCHE v. CAMBELL*. T. T. 1812. K. B. N. P. 3 Campb. 247. S. P. *TRECOTHICK v. EDWIN*. M. T. 1816. K. B. N. P. 1 Stark. 468. S. P. *CALLAGHAN v. AYLETT*. 3 Taunt. 397. *GAMMON v. SCHONALL*. 1 Taunt. 344; S. C. 1 Marsh. 80.

This was an action by the indorsee against the acceptor of a bill accepted, "Payable at Sir John Perring and Co., bankers, London." The declaration alleged no averment of presentment at Sir John Perring and Co.'s; however, verdict and judgment were given for the plaintiff. Whereupon a writ of error was brought in the House of Lords, and special error assigned, that the count in the declaration in the bill, contained no averment that it had been ever presented for payment at Sir John Perring and Co.'s. Upon this case the House of Lords submitted to the consideration of the twelve judges the following questions;

1st Whether, on such acceptance, it were necessary to prove presentment at the specified place, and aver it in the declaration?

2d. Whether such an acceptance was to be considered as a qualified acceptance, or as a general one, with an additional engagement for payment at the place mentioned?

3d. Whether if the party in whose favour the bill is drawn take an acceptance so qualified, either as to time or place, without the authority or assent of the drawer, he can maintain any action against the drawer on the bill?

And lastly, Whether, under the circumstances, he could maintain such action against the drawer, without previously delivering up the bill to him?

Upon the first question, the majority of the judges were of opinion, that it was necessary, (Holroyd, J., Graham, B., Richards, C. B. Abbot, C. J.) and Bayley, J., who took a distinction between the cases of a demand against the drawer, where it would be necessary, and against the acceptor, where it would not, and Richardson, J. said, where money is to be paid at a specified time, it is matter of defence.

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And if it be payable either in the country or in London, the holder has a right to present it at either place.

But if it be drawn in the country and "payable in London," by the directions of the drawer, it must be presented in London.]

And where a bill is payable at the house of a third person, a refusal by that person is a sufficient *sent de mand.*

Before the 1 & 2 Geo. 4. a bill payable at a particular place must have been presented there, in order to give the holder a cause of action against the acceptor.

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sented there, in order to give the holder a cause of action against the acceptor.

As to the second point, their opinions were divided. as upon the first; Bay ley, J. also considering that, as against the acceptor, was a general acceptance with an engagement for payment at the banking house; but that if he could show any loss arising from the neglect of the holder, in not duly presenting it he should be relieved to the extent of such loss.

As to the third question, the majority of the judges (eight against four) held that he could; but a distinction was admitted, where the qualification as to time or place produced a damage to the drawer, in either of which cases he could not.

And as to the last they were of opinion that he could not.

Upon the promulgation of the judges' opinions, the House of Lords held, that the words amounted to a qualification of the acceptance, imposing a precedent condition, which ought to have been shown on the record, and proved in evidence.—Judgment reversed.

6. FENTON v. GOUNDRY. E. T. 1811. K. B. 13 East. 458; S. C. 2 Camp. S. P. LYON v. SUNDIUS. T. T. 1808. K. B. N. P. 1 Camp. 423. S. P. F HEAD v. SEWELL. M. T. 1816. C. P. Holt. 363.

But much doubt had previously existed upon the point.

[441] Drawer against acceptor of a bill. The declaration stated that the defendant accepted the bill, payable at Sykes and Co.'s, and thereby became liable and promised to pay, according to the tenor and effect of the bill, and of his acceptance. There was no averment of a presentment for payment at Sykes and Co.'s, nor of any demand upon the defendant, other than the common allegation that the defendant, "although often requested," had not paid the bill. The defendant demurred specially, and assigned for cause the want of an averment. *Per Cur.* By the acceptance the acceptor engages to pay the bill on its being presented to him when due; and in common course, a presentation for payment at his usual place of abode, makes him liable every where. What is this then but an extension of the place where a demand may be made upon him—a notice to the holder that he may demand payment there, but still imposing upon him, by force of his acceptance, a general obligation to pay the bill wherever demanded of him? We admit that in Callaghan v. Aylett (2 Campb. 549) a different doctrine prevailed; and, therefore, in giving the opinion which we now pronounce, we do it with a reserve to look into that case; and if we see ground to suspend or alter our present opinion, we shall declare it before the end of the term. But besides, if this were to be taken to be a place fixed on by contract for the payment of the money, and if the defendant had his money there at the day ready to pay if demanded, he might have pleaded that he was ready to pay the money at the day and place appointed; but that would be only in bar of the damages, and not of the demand itself, for the defendant would be still liable to pay the money, and must pay it into Court.—Judgment nisi for plaintiff. The case was not mentioned again in the course of the term, and therefore the Judgment stood for plaintiff. See 2 Wils. 9; 2 Stra. 1195; 2 Taunt. 61; Com. L. of Bills of Exchange, 1 Campb. 423, 425; 2 H. El. 509. 7 East. 385.

HUFFAM AND ANOTHER v. ELLIS. H. T. 1811. Dom. Prac. 3 Taunt. 415. S. P. ROWE v. WILLIAMS. T. T. 1816. K. B. Holt. 366. n.

Even then a declaration that a bill was presented, &c. according to the tenor and effect of the said bill, and acceptance thereof, was good.

Error from the Court of K. B. The declaration stated that the plaintiffs in error drew on one A. a bill of exchange, which was accepted by the latter, payable "at the house of" certain persons using the names, &c. of K., S., and A. Averment, after stating the indorsement, that when the bill became due, it was shown, &c. to the persons so residing, &c." for payment thereof, according to the tenor and effect of the said bill, and of the said A.'s acceptance, &c.; but as well the said last mentioned persons as the said A. then and there refused and neglected to pay the same. The defendant below pleaded a sham plea, to which the plaintiff below replied, and obtained judgment. On error brought, the error assigned was, that the plaintiff below should have averred presentment at the place, as well as to the persons pointed out in the bill; which omission was not supplied by the allegation that the presentment was made "according to the tenor, &c." But it was held, that as evidence of a due

presentment might have been offered under such an allegation, the presentment must be supposed to have been regularly made.—Judgment affirmed. Yet saying that it was presented to the persons, and not at the place where made payable, was

8. *AMBROSE v. HORWOOD*. T. T. 1809. C. P. 2 Taunt 61.

A declaration on a bill of exchange stated that the defendant drew a bill of exchange on A. B. who accepted the same, payable at certain presentations, using the style of Messrs. F. and Co. of No. 6, Church-Street, Bermondsey, Southwark; and averred, that when the bill fell due, it was duly presented for payment to the said Messrs. F. and Co.; and that the same was dishonoured. On special demurrer, on the ground that due presentment was not averred, the Court held the variance fatal, as presentment at the particular place should have been averred, but allowed amendment on payment of costs. [442] held fatal on demurrer.

By 1 & 2 Geo. 4. c. 78. s. 1. after reciting that it has been adjudged where a bill is accepted, payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, and that a practise very generally prevailed among merchants and traders to so accept bills, and the same have among such persons been very generally considered as bills generally accepted, and accepted without qualification; it is enacted, that after the 1st of August, 1821, if any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house, or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except on default of payment, when such payment shall have been first duly demanded at such banker's house or other place. But now a presentment at the particular place is only necessary when the bill is made payable at a particular house only, and not otherwise or elsewhere.

2. *As concerns promissory notes.*

1. *ROCHE v. CAMBELL*. T. T. 1812. K. B. N. P. 3 Camb. 247.

Indorsee against indorser of a promissory note, describing the note as payable generally; but in the body of the note it was made payable at a particular place. *Lord Ellenborough, C. J.* said, as the declaration represents the note as containing an unqualified promise to pay the money, and the bill purports only a promise to pay upon a specific condition, that the payment is demanded at a particular place, the variance is fatal. If a note be made payable in the body of it at a particular place, a presentment there must be averred and proved.

2. *TRECOTHICK v. EDWIN*. M. T. 1816. K. B. N. P. 1 Stark. 468.

The whole of a note, except the names of parties, sum, and date, was printed; and at the bottom was also printed, "At Barclay, Fritton, and Co." In an action against the maker, a question arose, whether it was incumbent to prove a special presentment; and *Lord Ellenborough, C. J.* held that it was, since the stipulation for payment at a particular place being printed was to be considered as a part of the note, having been made at the same time. Or if the place of payment be printed at the foot of the note.

SAUNDERSON v. JUDGE. E. T. 1795. C. P. 2 H. Bl. 509; S. P. PRICE v.

MITCHELL. E. T. 1815. C. P. N. P. 4 Campb. 200. S. P. RICHARDS v.

MILSINGTON. Holt. N. P. 364. n.

A note made payable at the foot of it "at the plaintiff's banking house," was indorsed to them, and when it became due, the maker having no effects in their hands, they wrote to one of the indorsers to say it was not honoured, and afterwards brought an action against him; but it appearing that they had made no demand on the maker, they were nonsuited. On showing cause, however, against a rule for a new trial, the Court held, that it was no part of the contract in this case, that the note should be paid at the house of *Saunderson and Co.*, and that was not necessary to be stated in the declaration; and that it was not sufficient to present the note where the maker made it payable; and as the persons at whose house it was made payable were themselves the holders, it was sufficient for them to refer to their books, and see whether they had effects in hand; and a new trial was granted. But if the memoran be on ly written, a presentment there is not essential.

4. *BUTTERWORTH v. LORD LE DESPENCER*. T. T. 1814. K. B. 3 M. & S. 150.

S. P. BENSON v. WHITE. 4 Dow's Rep. 334.

In an action against the maker of a note, payable at the house of a third person, it is not necessary to state in the declaration a special refusal there, provided a presentment and request to pay at the particular place be averred in the declaration; with the general refusal to pay at the end of the declaration

Though where it was alleged

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But where it was merely stated that the defendant made the said note payable at a particular place, a contrary rule was held to prevail.

So if a note be made payable at a banker's, and the banker is himself the holder, it is a sufficient presentment, if he examines his books to ascertain whether he has effects

Payee against the maker on a note payable at the house of White and Co. A presentment at Wright's and Co.'s was stated in the declaration; and it was alleged at the end of it, that the defendant, although often requested, had not paid, &c.; but there was no special allegation of non-payment upon the presentment at Wright and Co.'s. Defendant demurred on this ground; but on argument the Court was clear, that the general allegation of non-payment sufficiently negated any payment at Wright and Co.'s. Lord Ellenborough. C. J. observed, if it were necessary that there should be a specific refusal in a given form, or by some positive act, it might be argued, that this general refusal would not be good; but a refusal need not be by an affirmative act. The not paying, which is only a negative act, or shutting the door is a refusal. All, therefore, that is necessary, is, that there should be a special request; and here a special request is averred. In *Saunderson v. Bowes*, (14 East. 500.) we only held, that we could not infer a special presentment from the allegation of a general refusal. Judgment for plaintiffs.

See 7 East. 384; Doug. 675; 3 Taunt. 397; 5 id. 30.

5. *EXON v. RUSSELL*. H. T. 1816. K. B. 4 M. & S. 505.

At the bottom of a promissory note was written "At Messrs. Brown and Co.'s, Bankers, London." In stating the note, in an action brought thereon, the declaration alleged that the defendant made the note, and thereby promised to pay, &c. and made the same payable and to be paid, according to the tenor and effect, at the house of certain persons described as Messrs. Brown and Co. Bankers, London. On rule nisi for a nonsuit upon another ground, the Court thought it a misdescription of the note to state as its import that it was made payable at a particular place. For as the place was mentioned by way of memorandum only, and not as a part of the contract, that was not its import; and on that ground the rule for a nonsuit was made absolute.

in a declaration that the maker of a promissory note made the same payable according to its tenor and effect, at a particular place, and that direction was not on the instrument itself, but merely at the foot, it was held that there was a fatal misdescription.

6. *PANNELL v. WOODROFFE*. Sittings after Hilary Term, 1818, at Westminster, before Abbott, J. MS. Chit. on Bills, 6th edit. 254.

Payee against maker of a note. The declaration stated that the defendant made his promissory note, bearing date, &c.; by which said note the defendant, three months after the date thereof, promised to pay to the said plaintiff, or order, the sum of 100*l.*, value received. and made the said note payable at 32, Castle-street Holborn; and then and there delivered the said note to the said plaintiff, by means, &c. (stating the liability and promise to pay according to the tenor and effect of the note, but not averring any presentment for payment.) The place of payment was not mentioned in the body of the note, but only by way of memorandum at the bottom; whereupon it was contended, on the authority of the above case of *Exon v. Russell*, that the first count was open to the objection of variance; but Abbott, J. overruled the objection. In Easter term it was moved for a rule for a new trial, or in arrest of Judgment, on the ground that the note given in evidence varied from the special statement of it in the declaration, and that that statement importing a special place of payment, the count was bad for want of an averment of presentment. But the Court held that the declaration did not import any special or limited promise to pay at a particular place, and that this case was distinguishable from *Exon v. Russell*.

7. *SAUNDERSON v. JUDGE*. E. T. 1795. C. P. 2 H. Bl. 509.

Action on a promissory note made payable at the plaintiffs, to whom it had been indorsed; when it became due, the maker having no effects in their hands they wrote to one of the indorsers, to say it was not honoured, and afterwards brought an action against him; but on its being contended that there was no proof of a demand on the maker, they were nonsuited. On showing cause, however, against a rule for a new trial, the Court were of opinion, that it was sufficient to present the note where the maker made it payable; and as the persons at whose house it was made payable were themselves the holders, it

was enough for them to refer to their books, and see whether they had effects in hand. A new trial was accordingly granted.

(c) *By whom to be made.*

A presentment should be made by the holder of a bill or note, or by his authorised agent; see 1 Esp. 115; 10 Mod. 286.

(d) *To whom to be made.*

The presentment should be made to the person on whom it is drawn; Poth. pl. 129. But it is not necessary that the demand should be personal; see 5 Esp. 265; 2 Esp. 512; 2 Show. 235; it being sufficient, we have seen, to make it at the house where made payable, or to the acceptor's or maker's agent, who has been used to pay money for him; 12 Mod. 242.

(e) *At what time of the day to be made.*

1. PARKER v. GORDON. E. T. 1806. K. R. 7 East. 385; S. C. 3 Smith. Rep. 358; S. C. 6 Esp. 41.

A drawee of a bill of exchange accepted it, payable at D. and Co.'s his bankers. At the part of the town where D. and Co. lived, bankers shut up at six o'clock. The bill was not presented for payment until after six, when the shop was shut up, and the clerks gone. In an action against the drawer, Lord Ellenborough held that this was not a good presentment, and nonsuited the plaintiff; and on a motion for a new trial, the Court held, that if a party took an acceptance payable at a banker's, he bound himself to present the bill during the banking hours, and therefore rule refused. Lawrence and Le Elanc, Js. said, the holder was not bound to take such an acceptance; and see *ante*, 439. See 2 H. El. 509; 4 id. 170; 2 Stra. 1195.

2. ELFORD v. TEED. H. T. 1813. K. B. 1 M. & S. 28.

The drawee accepted a bill payable at his bankers, A. B. and Co. The only evidence of a presentment was by a notary's clerk, between half after six and seven in the evening. The banking house was then shut, and the answer at the private door was, "no orders." Lord Ellenborough allowed the plaintiffs to take a verdict, with liberty to defendant to move to enter a nonsuit. A rule nisi had been obtained to set it aside, and on cause shown, the Court thought this presentment too late; that it furnished no ground for presuming that there had been a prior presentment by the holder, within the banking hours; but that plaintiff might have an opportunity of proving such a presentment, they allowed him to have a new trial on his paying the costs. See Marius, 2d edit. 187.

3. HENRY v. LEE. H. T. 1814. K. B. 2 Chit. Rep. 124. S. P. GARNETT v. WOODCOCK. M. T. 1816. N. P. 1 Stark. 475.

Per Bayley, J. If a bill of exchange is presented after the usual hours, it is at the peril of the person presenting it, for if nobody is there it will not do; but if there is, then it is immaterial at what time it is presented. See 1 Starkie. 475.

4. BARCLAY v. BAILEY. M. T. 1810. N. P. 2 Camp. 527.

Assumpsit against the drawer of a bill of exchange accepted by A. It appeared, at eight o'clock in the evening, the day the bill became due, it was presented at A.'s house for payment, and the answer received was, that A. was a bankrupt, and had removed to another part of the town. Defendant stated that a person was engaged to take up the bill, who attended from nine in the morning until four in the afternoon, but no one presented it; he therefore contended that eight in the evening was an unseasonable hour, and insufficient to charge the drawer; but Lord Ellenborough said, it was not an improper time to present a bill for payment at the house of a private merchant, it would be otherwise with bankers, who have stated hours for business.—Verdict for plaintiff.

(f) *In what manner to be made.*

HAYWARD v. BANK OF ENGLAND. E. T. 1722. K. B. 1 Stra. 550.

* So where a bill is payable at a bankers, a presentment to their clerk at the clearing house is sufficient; Robson v. Waugh, 2 Taunt. 288; abridged ante, vol. iii. p. 383. S. P. Reynolds v. Chettle; 3 Camp. 596.

in his hands.*

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A presentment out of the hours of business to a person of a particular description, for example, a banker, in a place where by the known usage all persons of that description begin and leave off business at stated hours is insufficient.

And it has been recently determined, that no inference is to be drawn from the circumstance of the bill being presented by a notary in the evening, that it had before been duly presented with in the banking hours.

[446] But the presentment of a bill out of the usual hours is considered good, if there is any one at the place who refuses payment.

The preceding rules applies to bankers only, for a presentment at the

private house of a merchant, even at 8 in the evening, is sufficient. On presentment for payment, the bill, unless paid, should not be left.

The plaintiff kept cash at the Bank, and paid in a banker's note. The runner to the Bank left it the next morning at the banker's, and called for the money in the afternoon, but in the interval the banker had stopped; and though this appeared to be the usual practice at the Bank, King, C. J. said, it was dangerous to suffer persons to deal with notes in that manner, and that the plaintiff was entitled to recover; but he directed the jury only to assess the damages for the composition the bankers had actually paid.

(C) WITH REFERENCE TO THE ACTUAL PAYMENT OF A BILL OR NOTE.

1st. TO WHOM IT IS TO BE MADE.

(a) *In general.*

Payment should be made to the real proprietor of the bill; Poth. pl. 142-3; or to some person authorised by him to receive the money. See 11 East. 140.

(b) *If the holder be an infant.*

If the holder of a bill or note be an infant, payment should be made to his guardian. But it seems that the payment to him himself is good, it being presumed beneficial; Poth. pl. 166.

(c) *If the holder be married.*

If a *feme covert* be the holder of a bill or note, payment should be made to the husband; See Connor v. Martin, 1 Stra. 516. abridged. Barlow v. Bishop, 1 East. 432; S. C. 3 Esp. 266. abridged, *ante*, 35.

(d) *If the holder die.*

Upon the death of the holder of a bill or note, payment should be made to his personal representative; see Allen v. Dundas, 3 T. R. 125.

(e) *If the holder become bankrupt.* See *ante*, vol. iii. p. 715.

If the holder of a bill or note become bankrupt, payment should be made to his assignees.

(f) *If the holder become insolvent.*

Payment of a bill or note to an insolvent is valid, providing the debtor be ignorant of the insolvency; Bayley on Bills, 258. 4th edit.

2d. BY WHOM IT IS TO BE MADE.

Of payment by bankrupts, see *ante*, vol. iii. p. 720; and *post*, division, Payment; *snpra*, Protest.

3d. AT WHAT TIME TO BE MADE, AND OF ITS BEING MADE BEFORE BILL OR NOTE IS DUE.

If a party liable on a bill or note pay it before it has become due, he does it at his own peril; Marius p. 31. 4th edit.; for where a banker paid a lost check to a stranger, before it had arrived at maturity, the banker was holden liable to pay it over again; Bayley on Bills, 260. 4th edit.

4th. IN WHAT MANNER TO BE MADE.

1. DA COSTA v. COLE. T. T. 1688. K. B. Skin. 372.

A bill of exchange was drawn in Oporto, for 1000 *mille rees*, dated 6th August, payable 30 days after sight. Upon the 14th of August, the King of Portugal lessened the value of the *mille rees* 20l. per annum. On the question, whether the bill or note ought to be paid according to the current value at the time the bill was drawn or became payable, Holt, C. J. ruled, that the bill ought to be paid according to the ancient value, because the King of Portugal cannot alter the property of a subject of England.

2 POLLARD v. HERRIES. H. T. 1803. C. P. 3 B. & P. 335.

Assumpsit on a promissory note. It appeared that the defendant, previous to the French revolution, kept a banking house at Paris, where he was accustomed to receive cash from persons who were about to travel, and give them promissory notes, similar to that on which the present action was brought.

The plaintiff paid cash to a certain amount into the house of the defendant, and received from the latter the following promissory note. "At seven days after sight, according to agreement, I promise to pay to the order of Mr. John Carter Pollard, the sum of, &c. with interest agreed for, at the rate, &c. value received," expressed to be made "by procuration of Sir John Herries," and made payable as above, in Paris, or, at the choice of the bearer, at Dover, or at the defendant's house in London, according to the course of exchange upon

The reduction of the value of coin in a foreign state after the drawing of a bill payable there, has no effect upon the amount the holder is to receive.

[448] And if by the terms of a note the holder has the option of being paid, either at the place where it was made

Paris." At the time the note was presented in London for payment, the direct exchange between London and Paris had, on account of the war, ceased; but a mean of obtaining the exchange from Paris was still open through Hamburgh, which course had been adopted, and the number of livres Tournois for which the note was given, far exceeded in value, through that channel, their respective worth, when the direct exchange closed. The defendant considering that the plaintiff ought to confine his demand to the rate of exchange when the direct course terminated, paid into Court a sum to that amount. The jury found for the plaintiff for the amount of the note with the exchange gained by the course of Hamburgh, subject, however to the opinion of the Court on the above facts. *Lord Abney, C. J.* This question must be decided on the construction to be given to the words "au cours d'usage," the terms in which the defendant engaged the note. The defendant's counsel has assumed, that when the note was made, the parties contemplated only the direct exchange, and has, on those grounds, contended, that as, at the time of presentment, no exchange within those terms existed, the plaintiff is only entitled to the amount of the livres, with exchange after the rate existing at the time of its interruption. These arguments are at first plausible, and we were at first inclined to adopt them; but, on considering the terms in which the note is conceived, we are of opinion that the defendant bound himself to pay the note with exchange, according to the rate existing at the time of presentment. It is true that the exchange being in its nature fluctuating, the defendant may, by intervening circumstances, affecting its rise or fall, sustain considerable inconvenience, or, on the contrary, be much benefited by the delay of the plaintiff in presenting the note; as, in the event of a depression in the rate of exchange, the defendants had the opportunity of making an extensive per centage for a very inferior return. Judgment for plaintiff. See 5 T. R. 87.

3. RUSSEL V HANKEY. M. T. 1794. K. B. 6 T. R. 12.

A special action disclosed on the case as follows; that the defendants were bankers in London, and the plaintiffs their customers in the country; that the plaintiffs had delivered to the defendants, three bills of exchange, in order that the defendants might procure payment, of the sums therein mentioned; the defendants accordingly presented the bills for payment, and, instead of receiving the amount in cash, took a check drawn upon a banker, and delivered up the bills; the check being dishonoured, the plaintiff brought this action against defendants, at the trial of which it was contended, that the defendants had been guilty of negligence in giving up the bills for the check without ascertaining its validity. For the defendant's it was urged, that they had been guilty of negligence, inasmuch as it was the ordinary course of business and the custom of merchants; and Lord Kenyon entertaining the same opinion, the plaintiffs were called. On motion to set aside the verdict, the Court refused the rule.

5to. WHAT RECEIPT TO BE TAKEN.

1. SHOLEY V. WALSBY. M. T. 1790. K. B. N. N. Peake. 25.

Action on a bill of exchange. To prove payment, the bill was produced, which had a receipt on the back of it, as being paid to a person who was at that time the holder of it. Lord Kenyon, C. J. held that the receipt on the back of the bill was *prima facie* evidence that it had been paid by the acceptor; he said it is advisable in all cases, when payment is made by a drawer or indorser, for the holder to state in the receipt by whom it was paid.

2. PFIEL V. VANBATENBERG. Lent. Ass. 1810. K. B. N. P. 2 Campb. 440.

Several bills of exchange were produced, receipted in the usual form; but it not appearing by whom the receipts were written, Lord Ellenborough, C. J. was of opinion, that the receipts were not proof of payment, unless it could be

* Marius 21. says, the holder ought not to give up the bill until the draft be paid. And in a late case at Nisi Prius, it was considered, that the drawer and indorsers of a bill would be discharged by the holders taking a check from and delivering up the bill to the acceptor, in case the check be not paid, because the drawer and indorsers have a right to insist on the production of the bill, and to have it delivered up on payment by them; Chitty on Bills, 287. 6th edit.

† Which need not be stamped, like other receipts; 44 Geo. 3. c. 98. sch. A.

or accord
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course of
exchange,
between
that place
& another,
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according
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And though
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a banker
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payment,
and who
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the accep
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which is af
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dishonour
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charged.*

A general
receipt on
the back of
a bill is
prima facie
evidence of
its having
been paid
by the ac
ceptor.†

But it must
be shown
to be in the
hand-writ

ing of a person entitled to demand payment.

shown that they were in the hand-writing of the plaintiff, or some other person authorised to receive payment of the bills, it being possible that the receipts might be written on the bill without the plaintiff's privity.

6th. PAYMENT SUPRA PROTEST.

[450] After a foreign bill had been protested for non-payment, any person may pay it (under protest) for the honour of the drawer, or of an indorser; and he is entitled to demand repayment not only from the person for whose honour he made the payment; Beawes. pl. 50. 2d edit.; but from all other parties who would have been liable to that person; Beawes pl. 57. 2d edition.

(D) WITH REFERENCE TO REFUNDING AFTER PAYMENT OF A BILL OR NOTE.

1. PRICE A. NEALE. M. T. 1762. C. P. 1 Blac. 390; S. C. 3 Burr. 1354.

A bona fide holder, not guilty of laches, can not in general after receiving payment be compelled to refund.*

This was an action for money had and received to the plaintiff's use. At the trial, it was proved that "a bill of exchange for 40*l.* was drawn in the name of one Sutton upon the plaintiff, payable six weeks after date to one Ruding;" that this bill was negotiated, and after passing through several hands, the plaintiff duly accepted it by writing on it "Accepted, John Price." The bill being so accepted, was afterwards indorsed to the defendant for a valuable consideration, and left at his bankers for payment, and was paid by the plaintiff, and taken up when due. Both these bills were forged by one Lee, who was afterwards hanged for the forgery. The defendant acted innocently, and *bona fide* without the least privity or suspicion of the said forgeries, or of either of them, and paid the whole value of those bills. The jury found a verdict for the plaintiff, subject to the opinion of the Court, upon the question, viz. whether the plaintiff, under the circumstances of the case, can recover back from the defendant the money he paid on the said bills, or either of them.

Per Cur. This is an action for money had and received to the plaintiff's use; in which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action. But it never can be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of forgery. Here was no fraud nor wrong. Nobody knows the hand-writing of the drawer but the plaintiff. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. The plaintiff made no objection to the bills, at the time of paying them; therefore; whatever neglect there was, was on his side; but if there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man.—*Postea* to the defendant.

[451]

(E) WITH REFERENCE TO THE EFFECT OF A PARTIAL PAYMENT OF A BILL OR NOTE.

1. BACON V. SEARLES. M. T. 1788. C. P. 1 H. Bl. 88. S. P. PIERSON V. DUNLOP. Cowp. 571.

The indorsee, after having received part of the contents of a bill of exchange

The holder of a bill, it has been said, is only entitled to the *residue* after a partial payment.†

* But if a person, under a misapprehension of facts pay a bill which he was under no legal obligation to discharge, as where the person whom he paid had been guilty of laches, which, had the bill not been paid, might, in an action brought upon it, have been a sufficient ground of defence, he may, it has been said, if prejudiced, recover back the money *Chutfield v. Paxton*, cited *Chit*, on Bills, 6th edit; yet from the case of *Bilbie v. Lumley*, 2 East. 469; and see post, 491-2-3-4; it appears that money paid by one knowing all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder. See post, tit. money had and received.

† In an action for money had and received by the holder of a bill of exchange against a person who has received a sum of money from the acceptor to satisfy it, any defence may

from the drawer, brought this action against the acceptor, when the question was, whether he could claim more than the residue from the acceptor. It was argued for the holder, that he should stand as trustee for drawer, as to that part which he had received, to avoid circuitry of action. *Sed per Cur.* The payment by the drawer is a recall *pro tanto* of the order to pay, and the contrary doctrine would open the way to great mischief, especially in the case of accommodation bills.

2. *JOHNSON v. KENNION.* E. T. 1765. C. P. 2 Wils. 262.

The defendant drew a bill for 1000*l.* in favour of A. B. or order, and A. B. indorsed it to the plaintiff. A. B. paid the plaintiff 252*l.* notwithstanding which he took a verdict against the defendant for the whole 1000*l.* Upon showing cause why there should not be a new trial, the Court observed; we think it is a plain case that the plaintiff has a right to recover the whole of the money. Suppose A. B. had paid the whole 1000*l.* to the plaintiff, and A. B.'s name had not been struck out, and on action brought in plaintiff's name against the defendant, it could not have been said that the action was untenable.*

But this doctrine is in consistent with a prior decision.

XV. RELATIVE TO THE NOTICE OF THE DISHONOUR OF A BILL OR NOTE; OF THE PROTEST AND NOTING; AND OF THE ACTS OF THE HOLDER, WHEREBY THE PARTIES TO A BILL OR NOTE MAY BE DISCHARGED.

[452]

1st. NOTICE OF THE DISHONOUR.

(A) AS CONCERNS THE RIGHT OF THE ACCEPTOR OR MAKER TO NOTICE.

(a) *When requisite, and consequence of omitting to give.*

1. *PEARSE v. PEMBERTHY AND OTHERS.* T. T. 1812. N. P. 3 Camp. 261.

Action against makers of a promissory note, payable at Were's and Co., bankers. Defence, no notice of dishonour. It was contended, that had it been a bill of exchange, the defendants were clearly entitled to notice of dishonour; and for the same reason they were in this case, though the form of the instrument might be different. But Lord Ellenborough, C. J. entertaining a different opinion, a verdict was given for the plaintiff.

The maker of a promissory note, payable at a particular place, is not entitled to notice of dishonour.

2. *TREACHER v. HINTON.* E. T. 1821. K. B. 4 B. & A. 413.

This was an action by the indorsee of a bill against the acceptor, by whom it had been accepted, payable at a particular place. Plaintiff proved the acceptance and presentment at the particular place; but there being no notice to defendant of the bill's dishonour, the plaintiff was nonsuited, with leave to move to enter a verdict. A rule nisi had been obtained for that purpose. The Court thought the notice not necessary, and observed. The acceptance is not a check upon the banker. It cannot be declared upon as a check, but only as a bill of exchange accepted by the defendant. An acceptance payable at a banker's is substantially a statement by the acceptor, that that is the place at which payment will be made by himself, his banker, or his agent, and it is the duty of the acceptor to take care such payment is duly made, and by a perusal of his account kept with his banker, he may at all times ascertain what bills have been paid, and what dishonoured.—Rule absolute. See 7 East. 384; 1 M. & S. 28.

Nor the acceptor of such a bill, even before the 1 & 2 Geo. 4. c. 78., for he appoints bankers his agents by making the bill payable at their house.

3. *SMITH v. THATCHER.* H. T. 1821. K. B. 4 B. & A. 200.

Action by plaintiff as drawer, against defendant as acceptor, of a bill for 300*l.* at two months, accepted, payable at Messrs. Coutts's and Co. There was no proof of notice to defendant of dishonour, but proof that although defendant, when the bill was drawn, had a balance of 700*l.* in the hands of Messrs. Coutts and Co. yet that balance, at the time when the bill became due, was be set up which would have been available if the action had been brought against the acceptor himself; *Redshaw v. Jackson*, 1 Campb. 372. And if upon a bill becoming due, the party to it requests another to pay the amount out of a particular fund, and the latter agrees to comply with that request, in consequence of which the holder gives up the bill, he will be entitled to seek for payment, out of the fund, in pursuance of the agreement; 1 Ves. jan. 280.

Though this rule was formerly doubted, unless it could be shown that

* In *Bacon v. Scorter*, *supra*, Wilson, J. is stated to have considered the case inaccurate; and the authority questionable.

[453] reduced to 40*l*. Bayley, J. was of opinion that the defendant was not entitled to notice of the dishonour of the bill, and the plaintiff obtained a verdict. Rule nisi to enter a nonsuit. It was contended, that according to the case of *Orr v. Maginnis*, (post, 461.) the acceptor having had effects in the hands of Coutts and Co. at the time of his acceptance, sufficient to discharge the bill, was entitled to notice, although the balance might afterwards shift in favour of the acceptor. The Court, after observing that the principle in *Orr v. Maginnis* was not laid down with sufficient generality to apply to the case before them said, It may be very doubtful whether any notice at all be necessary under any circumstances; for here the acceptor having appointed a special place for payment, may perhaps be considered as having made Messrs. Coutts and Co. his agents for the purpose of paying the bill, and then this refusal to pay may be considered as a refusal by him, in which case no notice could be necessary. At all events, the rule in this case must be discharged, the acceptor not having had effects in his hands at the time the bill became due.—Rule refused. See 1 T. R. 405; 3 Campb. 1452.

(B) AS CONCERNS THE RIGHT OF DRAWEE AND INDORSERS TO NOTICE.*

(a) *When requisite, and what circumstances dispense with giving notice.*

1. BLESARD v. HIRST. M. T. 1770. K. B. 5 Burr. 2670.

If the drawee refuse to honour the bill, the holder must give notice of such refusal within a reasonable time, or the drawer and indorsers will be discharged.

Action against the defendants as indorsers of a bill of exchange. It appeared the defendants indorsed a bill, drawn on a house in London, to the plaintiff, who sent it to their correspondents in town. It was received on the 21st of March, and presented on that day for acceptance; but the house upon which it was drawn refused to accept. It was afterwards, on the 22d of April, the day on which it became due, presented and protested for non-payment. No notice was given of the refusal to accept the bill; but, on the 29th of April, the plaintiff gave notice to the defendants, that the house in London had refused to pay the bill, and that it was returned with charges of protest. Three days after this notice, one of the defendants called on the plaintiff at Bradford, on his way to Leeds, and said he would take up the bill as he returned; but on his return he said, he was advised he was not bound to do it. There being a verdict for the plaintiff, the question was, whether the plaintiff, the holder of the bill, could recover of the person from whom he received it, when he had thus neglected to give him notice of the refusal to accept it.

Per Cur. This man tendered the bill for acceptance, and it was refused, and he kept it three weeks without giving any notice of such refusal to accept. He ought to have given notice of this refusal and not to have concealed it; and by not giving notice, has taken the risk upon himself. The indorser of the bill is imposed upon: the person who neglected to give the notice ought to suffer first. The question is not, whether he was obliged to present it for acceptance. He has done so, and it was refused. There is no difference between an inland bill and a foreign one in this case. They are both now upon the same footing.—*Postea* to the defendants.

2. RUCKER v. HILLER. T. T. 1812. K. B. 16 East. 43; S. C. 3 Campb. 217.

Hence where the drawer had sold and shipped goods to the drawee, and drew the bill before they had arrived and the drawee not having received the bill of lading, refused to accept

In an action by the indorsee of a bill against the drawer, it appeared that the drawer had no effects in the drawee's hands, but that he had shipped goods which were on their way to the drawee. The drawee not having received the bill of lading and invoice, refused to take the goods because they were damaged, and having no other effects of the drawer's in his hands, returned the bill of exchange unaccepted. No notice of such dishonour was communicated by the holder to the drawer. It was insisted, that as the drawee had not received effects, defendant was not entitled to notice. Lord Ellenborough thought otherwise, as the drawer was in expectation that the goods he had shipped would have reached the drawee, and nonsuit. A notice was now made to set aside

* This notice is required, in order that the anterior parties to the bill may respectively take the necessary measures to obtain payment from the parties respectively liable to them and if notice be not given, it is a presumption of law that the drawer and indorsers are prejudiced by the omission, and it is on this principle that notice of non-acceptance and non-payment are required; see 2 B. & P. 280, 7 East. 362.

the nonsuit. *Per Cur.* A *bona fide* reasonable expectation of assets in the hands of the drawee has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ultimately have failed to be realised. The case is very different where the party knows that he has no right to draw the bill. If we were to extend the exception further, it would come at last to a general dispensation with notice of the dishonour, in all cases where the drawer has no assets in hand at the very time of presenting the bill. Such being the rule of law, it was the duty of the plaintiff to have shown that the drawer could not possibly have been injured by the want of notice.—Rule refused. See 1 T. R. 405; 15 East. 216; 2 Campb. 310; 3 id. 145 164; and see *Claridge v. Dalton*. post. 462.

3. *WHITFIELD v. SAVAGE*. M. T. 1800. C. P. 3 B. & P. 277.

A., being in want of money, the plaintiff drew a bill in his favour, and which was accepted by B., who held property belonging to the plaintiff. A., indorsed the bill for full value to the defendant, who indorsed it over to another person. A., on the day before the bill became due, paid to the plaintiff the major part of his debt to him on the bill; but the latter being informed that B. had become insolvent, and being unwilling to have the bill returned to him, repaid to A. the sum he had paid him, and directed him to hand it to the defendant to meet the bill when presented, which A. did, together with the remaining sum, making the total amount of the bill. The bill was not presented to the defendant, nor was notice of its non-payment given, which the plaintiff having learned from the defendant, four days after the time for presentment, desired him not to pay it if presented, and offered him an indemnification for such refusal. Nevertheless, the defendant, on the bill being subsequently presented, paid the money; on which this action was brought as for money had and received to the plaintiff's use. Verdict for plaintiff for the whole amount. On motion for a new trial, Eldon, C. J. said, The question in this case turns on the exemption of the holder of the bill, from his obligation to give notice of its dishonour and in order to determine this; we must consider the relative situation of the parties. It has been shown that the bill was drawn solely for the accommodation of A., on which account he had no claim to notice; but the plaintiff who had drawn it had effects in the hands of the acceptor, and was, therefore, notwithstanding such acceptor's insolvency, entitled to notice. It has been contended for the defendant, that because the plaintiff had paid the money into the defendant's hand, the latter was thereby authorised to appropriate it in the terms of the plaintiff's original intention at any time. We think such an argument cannot be supported; but even admitting it, the plaintiff's intent in placing the money still remains open to construction. Now, the natural inference that arises on the plaintiff's act is, that he deposited the money for the purpose of meeting the payment of the bill, whenever it should be duly demanded, with a tacit provision that in case of the intervention of any circumstance relieving him from the responsibility, the defendant should not apply the money as at first directed. The bill was not regularly presented; and no notice of dishonour by the acceptor being served, the plaintiff countermanded the order he had given to the defendant to pay the money, and besides offered him a guarantee for the consequences of his refusal. The plaintiff, ought, therefore, to have kept the money, and could not have sustained any injury from so doing.—Rule refused.

4. *MEGADDOV v. HOLT*. H. T. 1690. K. B. 12 Mod. 15; S. C. Show. 317; S. C. Holt. 113.

* And it is not sufficient for the holder to wait till the time mentioned in the bill, for payment has elapsed, and then to give notice of non-acceptance as well as of non-payment; *Roscow v. Hardy*, 12 East. 434; see 1 T. R. 712. But a *bona fide* holder, to whom a bill has been transferred after refusal to accept, is not affected by the neglect of any previous holder, in giving notice of that fact, See *Selw. N. P.* 319. 4th edit. So if the bill be on a wrong stamp, the neglect to give notice of a refusal to accept will not prejudice; *Wilson v. Vysar*, 4 Taunt. 288. abridged ante. So if a bill be taken under an extent, the neglect of the officers of the crown to give notice of the dishonour cannot be deemed laches; *Wells on Extents*, 28-2

Formerly want of notice was no defence, unless actual damage could be proved to have been sustained. [456]

An action was brought on a bill of exchange, in which the plaintiff declared, that the defendant drew a bill of exchange according to the custom of merchants, on one W., a merchant at Rotterdam, payable to H., within two usances and an half, and alleged them to be at Rotterdam two months and an half; and then set forth the custom, that if such bill be protested for non-payment, the drawer is liable. That the bill was assigned over; and being tendered to W., he did not pay it; whereon the plaintiff protested, and brought this action against Holt. *Per Cur.* The plaintiff must have judgment; 1st, because the law of merchants is the law of nations, and part of the common law, and therefore we ought to take notice of it when set forth in pleading; 1 Inst. 11. b. 182. a. The law of merchants in this case is, that if he who has such a bill lapses his time, and does not protest, or make his request, if any accident happens by his neglect in prejudice to the drawer, he has lost his remedy against him; but if such a thing had happened, it ought to have come from the other side; and not being so, we must judge on the declaration. It is not necessary to show the custom of merchants, but necessary to show how the usance shall be intended, because it varies as places do.

But it is now settled that such damage is to be presumed.

5. DENNIS v. MORRICE. E. T. 1800. K. B. N. P. 3 Esp. 158.

Action on a bill by indorsee against drawer. It appeared, that no notice had been given to the defendant of non-payment by the acceptor, to excuse which the plaintiff offered to prove, that in fact the defendant had not been prejudiced by the want of such notice. But Lord Kenyon. C. J. said, the only case in which the notice is dispensed with is, where the drawer has no effects in the hands of the drawee. The doctrine contended for would be extending the rule further than it ever has been done, and opening new sources of litigation, in investigating whether, in fact, the drawer did receive a prejudice from the want of notice or not. He rejected the evidence, and nonsuited the plaintiff.

6. BICKERDIKE v. BOLLMAN. M. T. 1786. K. B. 1 T. R. 405.

Upon a case reserved, the question was, whether a bill a bankrupt had drawn in favour of the petitioning creditor, upon a man who then, and from that time till the bill became due, was one of the bankrupt's creditors, had discharged so much of the petitioning creditor's debts, no notice having been given of its dishonour to the bankrupt, the Court were of opinion that it had not, because the reason why notice is in general necessary is, that the drawer may, without delay, withdraw his effects from the drawee, and that no injury may happen to him from want of notice; but where the drawer has no effects in the hands of the drawee he cannot be injured, and is not entitled to any notice. See 1 T. R. 712; 12 East. 171; S. C. 2 Campb. 310.

7. ORR v. MAGINNIS. E. T. 1806, K. B. 7 East. 358; S. C. 3 Smith. Rep. 328.

In an action by the payees against the drawer of a foreign bill, payable at 90 days after sight, the declaration averred presentment for acceptance and refusal, presentment for payment and refusal, and protest for non-payment. It then averred, that at the time of making the bill, and from thence until presentment for payment, the defendant had no effects in the hands of the drawees. At the trial, it appeared that at the time of drawing the bill, the defendant had effects in the hands of the drawees, but to what amount did not appear; but that when the bill was presented for acceptance, and from thence until presentment for payment, he had not any. The bill was only noted for non-acceptance, but was protested for non-payment. No notice of non-acceptance was given to the defendant. The plaintiffs had paid the amount to an indorsee. They were nonsuited for want of proving protest for and notice of non-acceptance. On motion to set aside the nonsuit, Bickerdike v. Bollman (*ante*, p. 455) and other cases were cited to show that no notice, and therefore no protest, was necessary. But Lord Ellenborough said, that that case went on the ground that there were no effects in the hands of the drawee at the time when the bill was drawn, and the other cases followed on the same ground; but that no case had extended the exemption to cases where the drawee had effects of the drawers in his hands at the time when the bill

was drawn, though the balance might vary afterwards, and be turned into the [457] opposite scale.—Rule refused. See 2 T. R. 714; 1 B. & P. 652; 3 id. 239.

8. HAMMOND AND OTHERS V. DUFRENE. M. T. 1811. N. P. 3 Campb. 146.

Action by the holder of a bill of exchange against the drawer. To excuse want of notice, one of the acceptors was called, who said they had no effects in their hands at the time the bill was drawn and accepted; but before it became due, a sum of money was paid by drawer, on their account. Plaintiff's counsel insisted that defendant was not entitled to notice, as it was an accommodation bill. But *Lord Ellenborough* said, the whole period from the drawing to the maturity of the bill ought to be taken into account; consequently if the drawer has had effects in the hands of the acceptor any time before the bill becomes due, he is entitled to notice of dishonour. Verdict for plaintiff.

9. WILKES V. JACKS. M. T. 1793. K. B. N. P. Peake. 202.

Action against the defendant, as indorser of a bill drawn by Vaughan. Defence that no notice of dishonour had been given. It appeared that Vaughan had no effects in the hands of the acceptor.

Lord Kenyon, C. J. said, the rule extends only to actions brought against the drawer; the indorser is, in all cases, entitled to notice, for he has no concern with the accounts between the drawer and the drawee.

10. LEACH V. HEWITT. H. T. 1813, C. P. 4 Taunt. 731.

In an action against the indorser of a bill of exchange, it appeared, that A. having drawn a bill of exchange on B. & Co., payable to the defendant or order, prevailed on the defendant to indorse it, which he did, without consideration. The bill, after several indorsements came to the plaintiff's hands bona fide; On the bill being presented for payment, it was discovered that the drawer and acceptors were fictitious persons; the defendant, however, was found four days after the bill was due; and though at first he denied, he afterwards acknowledged his signature, and he was arrested without difficulty. It was urged for the defendant, that he ought to have had notice of the non-payment, and was therefore discharged; which was opposed, on the ground that the defendant was implicated in the original fraudulent concoction of the bill. The jury found that defendant was not party to the fraud, and the plaintiff was nonsuited. On a rule nisi to set it aside, the plaintiff's counsel objected, that as no consideration was given to the defendant, the principle on which he would be entitled to notice, if consideration had been given, did not apply; and that, having only an ostensible, and no real character, the notice was immaterial.

Per Mansfield, C. J. Whether or not the defendant received value for the bill, he has by his indorsement, rendered himself responsible for its amount, on failure of the acceptors to pay. He has placed himself in the common situation of an indorser; and, as it has been found that he did not participate in the fraud committed, by A. he was clearly entitled to notice. Rule discharged.

11 WALWYN AND OTHERS V. ST. QUINTIN. H.T. 1797. C.P.1 B. & P. 652; S. C. 2 Esp. 516.

Assumpsit against the drawer of a bill of exchange. It appeared, that the bill in question was drawn by the defendant on A. in favor of and for the accommodation of B., who placed certain securities in the hands of A. to guarantee his acceptance; but held no effects of the drawer. The bill was not honoured when due, and was protested, but the defendant had not notice thereof, till four days after the dishonour. In consequence of a threat by the plaintiffs to proceed against A. & B. the latter paid a certain sum into the hands of the plaintiff's attorney on account, and the plaintiffs agreed to give time to A. The defendant, previous to the maturity of the bill, became insolvent; and having made over his property in favour of his creditors, quitted his usual residence. The jury, being of opinion that the bill was not an accommodation bill, found for the defendant, in the absence of due notice of the dishonour of the bill; and a rule nisi for a new trial being obtained, it was contended that the principle on which it was incumbent on the holder of a bill of exchange to give notice to the drawer of its dishonour by the acceptor, namely, to allow the drawer an opportunity of clearing himself, applied to the case. The court was divided, but the rule was discharged.

tunity of withdrawing any property of his in the acceptor's hands, was inapplicable to this case. *Eyre, C. J.* said, It has been urged for the defendant, that he is absolved from his responsibility on the bill in consequence of the failure of the holder to give the usual notice of its dishonour by the acceptor. but, adverting to the principle on which such notice has been considered necessary, we think the argument of the plaintiff's counsel correct. See 1 T. R. 403.; *ibid*, 167; 2 Stra. 45; 1 Ld. Raym. 764.

12. *DE BERDT v. ATKINSON.* T. T. 1794. C. P. 2 H. Bl. 336. S. P. Sisson v. THOMLINSON. M. T. 1805. K. B. 1 Selw. N: P. 346. 6th edit.

In an action against the payee of a note it appeared that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing that the defendant gave no value for the note; that he lent his name merely to give it credit; and that he knew at the time that the maker was insolvent; the Court were of opinion that the plaintiff was entitled to recover; and observed, It has been said that the insolvency of the drawer does not take away the necessity of notice. That is true where value has been given, but no further. Here it is plain that the defendant lent his name merely to give credit to the note, and was not an indorser in the common course of business. It is no answer to say that he received no benefit; he never meant to receive any. This case may be decided without breaking in upon any rule hitherto propounded in cases where value has been given.

13. *SMITH v. BECKET.* M. T. 1810. K. B. 13 East. 187.

In an action against the payee and indorser of a note drawn by A. B., dated the 28th of October, 1809, and payable on demand; it appeared, that the defendant had lent his name to this and other notes, merely to enable A. B. to obtain credit with the plaintiffs, his bankers, he having then lately stopped payment, which was well known to all the parties. The plaintiffs made advances for six months upon these notes, which they afterwards renewed, without any communication with the defendant. On the 28th of May, 1810, A. B. became bankrupt, and payment of him was afterwards demanded and refused, but no notice of this dishonour was given to the defendant. Lord Ellenborough thought a notice necessary and nonsuited the plaintiffs. And on a motion to set aside the nonsuit, *De Berdt v. Atkinson* (*supra*) was cited; but the Court held clearly that a notice was necessary, especially as the advances had been renewed without the defendant's knowledge.—Rule refused.

See 1 T. R. 405; 2 H. Bl. 609.

14. *BROWN v. MAFFEY.* H. T. 1812. K. B. 15 East. 216.

Action on a bill drawn by A. B. on C. D., payable to E. F. or order, indorsed by E. F. to the defendant by the defendant to G. H., by G. H. to I. J. to the plaintiff. The bill was drawn for I. J.'s accommodation, and all the prior names were lent to him. It did not appear that the defendant knew that any name was lent excepting his own. The bill was dishonoured, but notice of the dishonour was not sent to the defendant. Bayley, J. thought the notice necessary, because, if the defendant had paid the bill, he would have been entitled at least to have sued I. J., and therefore nonsuited the plaintiff. A rule *nisi* was granted to set aside the nonsuit, and *De Berdt v. Atkinson* (2 H. Bl. 336) and *Lisson v. Thomlinson* (Sel. N. P. 337. n.) were cited. But on cause shown, the Court thought it clear that the defendant was entitled to notice.—Rule discharged. See 1 Esp. 302; 1 T. R. 170. 405; 3 B. & P. 241; 2 id. 654; 7 East. 359; 12 id. 171; 13 id. 187; Peake. N. P. C. 202; 2 Burr. 676.

15. *CORY v. SCOTT.* T. T. 1820. K. B. 3 B. & A. 619.

Indorsee against drawer on bill drawn by defendant on A. B., and accepted by him, payable to C. D., indorsed by him to E. F., and by E. F. to plaintiff. There was no evidence of notice to defendant; but as an excuse, it was proved that defendant had no effects in A. B.'s hands; to which it was answered, that E. F. was to provide for the payment, and that A. B., defendant, and C. D., all put their names to accommodate him. Abbott, C. J. thought this re-

So if the payee of a note lend his name merely to give it credit, and to enable the maker to raise money upon it, and knows that the maker is insolvent, it has been held on that he is not entitled to notice.

But this authority is very questionable.

So where a bill was drawn for the accommodation of a remote indorser, and the names of all the prior parties were lent to him, it was held in an action against one of those parties, an indorser, that the latter was entitled to notice of the dishonour of the bill, because upon paying it he would be entitled to sue such indorser for re-payment

[460] And in a subsequent

butted the excuse from want of effects, and nonsuited the plaintiff. On rule nisi to enter a verdict for plaintiff, the Court said: where the drawer has no effects in the hands of the acceptor, that is *prima facie* evidence that he will not be injured by the want of notice; but that *prima facie* presumption may be rebutted; and if the drawer can show actual prejudice, it takes it out of the case of *Bickerdike v. Bollman* (1 T. R. 405,) which established the general rule. One test is this; suppose the drawer pay the bill.—has he any remedy over against a third person? Now if the defendant had paid the bill, he would clearly have had a remedy over against E. F.; and he would also, we are inclined to think, have had a remedy over against the acceptor. It is not necessary, however, to decide that question, because his having it undoubtedly in his power to call upon E. F. is quite sufficient to distinguish this case from *Bickerdike v. Bollman*. There is, however, great difficulty in distinguishing it from *Walwyn v. St. Quintin* (1 B. & P. 652.) But we must say, that we cannot assent to the law there laid down; for if notice had in that case been given to the drawer, he might have had his remedy over against a third person. And *Walwyn v. St. Quintin*, it may be also observed, is inconsistent with *Brown v. Maffey* (*supra*.) The nonsuit was consequently correct.

case, this doctrine was distinctly confirmed.

But if he receive effects from the party for whose accommodation he indorses, to answer his responsibility, he is not entitled to notice.

16. CORNEY v. MÉNDEZ DA COSTA. H. T. 1795. K. B. 1 Esp. 302.

Da Costa and Co. compounded with their creditors; and to secure the composition drew notes in favour of the defendant, which he indorsed to the creditors. The defendant received effects of Da Costa at the time to the amount of the composition; and on an action being brought against him upon one of these indorsements, he insisted that he had no notice of the non-payment of the note, until five weeks after it was due. But Buller, J. held, that he was not entitled to notice; for having possessed himself of the effects, he was the proper person to pay it, and could have no remedy even on making the payment; and the plaintiff had a verdict.

17. FREY v. HAWKINS. M. T. 1817. C. P. 1 Moore. 535; S. C. 8 Taunt. 92; S. C. Holt. 550; S. C. not S. P. 7. Taunt. 278.

It appeared in this case, that A. B., a banker, being in embarrassed circumstances, agreed to dispose of his estates for the benefit of his creditors; but as the proceeds therefrom might prove inadequate to the satisfaction of their demands on him, he procured the notes of hand of several of his friends, as a collateral security, in case of any default in their produce. One of these, which formed the subject of the present action, was made by A. B., payable 12 months after date to the defendant or order, and indorsed by him to the plaintiffs, who brought this action on failure to pay by A. B., who had not disposed of his estates when the note fell due. The fact relied on in defence was, that the defendant had received no notice that the note had been dishonoured. The plaintiff then offered to show that, at the making of the note, a mutual understanding existed between the parties, that the payee should not be called on until the sale of A. B.'s estates, and the occurrence of the anticipated failure in their produce; and that the defendant had admitted that he was impressed with that idea. This evidence was rejected, and the plaintiffs were nonsuited. A rule nisi for a new trial being obtained, on the ground that such evidence was admissible, the Court said; in considering this case, we will premise, that the engagement of a promissory note must be taken to be what its terms express; and, therefore, that no evidence can be admitted which tends to vary the operation of such apparent contract. The present note was couched in such terms as rendered the defendant liable absolutely on the note's maturity, if the maker had sold his estates, and neglected to pay; the maker's refusal being therefore a condition precedent to the attachment of the defendant's responsibility, the defendant was entitled to notice that the property was not sold when the bill fell due, notwithstanding the security was only collateral, depending on the probable consequences of the sale.—Rule discharged.

Parol evidence of a verbal agreement that the note should not be presented, but on the recurrence of a contingent event, is inadmissible to waive the payee's right to notice of its dishonour.

18. WARRINGTON v. FURBOR. H. T. 1807. K. B. 8 East. 242.

The defendant applied to one Martin to purchase some goods to the amount of 1000*l.*, the price of which the plaintiff undertook to guarantee at a credit

Though proof that before the bill became

due, the parties liable thereon were insolvent, will be *prima facie* evidence that a demand upon them would have been of no avail, and, unless rebutted, will dispense with the necessity of giving notice.

[462] And in a subsequent case it was held that the bankruptcy or known insolvency* of the drawer of a bill of exchange was no excuse for a neglect to give notice.

But where A. was indebted to B., and C. to A., and B. drew a bill on C. for A's debt, it was held that no notice need be given to A. of the dishonour of the bill. It is no excuse for not giving notice to the drawer, that on an apprehension that the bill would be dishonoured, he lodged

of six months. The goods were furnished, and the defendant accepted a bill at six months for the amount. This bill became due on the 3d December, 1801; but on the 21st November preceding the defendant became bankrupt, and the defendant was obliged to pay Martin 1000*l.* on his guarantee; and now brought this action to be reimbursed. One of the objections made by the defendant at the trial was, that the plaintiff had not proved a presentment of the bill to the defendant for payment, without which it was insisted that Martin could not have recovered against the plaintiff on his guarantee, and therefore that the latter had paid the money in his own wrong. Lord Ellenborough held the proof unnecessary, this not being an action on the bill, and it being obvious that notice would have been unavailable, the defendant having been recently stripped of all his property, and the plaintiff had a verdict; and on a rule nisi to set it aside, and cause shown, the Court held the verdict right; and Lawrence, J. said, the guarantee was not prevented from showing, that he ought not to have been called upon at all, for that the principal debtor could not have paid the bill if demanded of him.—Rule discharged.

19. *ESDAILE v. SOWERBY*. E. T. 1809. 11 East. 114.

In an action by the indorsee of a bill, drawn by A. B. on C. D., in favour of the defendant, and by him indorsed to the plaintiff, a verdict was found for the plaintiff, and a case reserved. The bill which was payable in London, became due on Saturday, the 20th of February, when it was presented for payment, and dishonoured. By mistake, notice of non-payment was not given to the defendant, who resided at Liverpool, until the 27th of February; whereas it ought to have been given on the 24th; and payment was refused, on the ground of this laches. Before the bill became due, the drawer had stopped payment, and became bankrupt, and the acceptor was insolvent. The drawer had himself apprized the defendant of his situation at the time of his stopping payment, and that this bill would not be paid; and he knew that the acceptor had no funds but such as the drawer furnished him with; and on the 25th of February, he admitted to the plaintiff's agent that he knew of the insolvency of the drawer and acceptor. It was contended, that notice of dishonour was unnecessary; but the Court was clear that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonour of the bill to the defendant.—*Postea* to the defendant. See 1 Esp. 333; 2 H. Bl. 609; 2 B. & P. 277; 3 id. 239; 1 T. R. 169; 1 East. 245; 15 id. 216; Doug. 515.

20. *SWINYARD v. BOWES*. E. T. 1816. K. B. 5 M. & S. 62.

Action for goods sold. Defence, that plaintiff had drawn on C., a debtor of defendant, for the amount, and had given defendant no notice of the dishonour of that bill. C. was bankrupt a week after the bill became due, and was not in a condition in the *interim* to pay it. Bayley, J. thought the defendant not within the custom of merchants, because he was not a party to the bill. And as he did not appear to have been prejudiced by the want of notice, the not giving it him furnished no ground of defence; and on motion for a new trial, the Court concurred in this opinion, and refused the rule. See 3 M. & S. 362.

21. *CLEGG v. COTTON*. M. T. 1802. C. P. 3 B. & P. 239.

Action by indorsees against the drawer of a bill. The bill was drawn in America, on Cullen of Liverpool, in favour of Miller and Robertson, and by them indorsed to Booth and Co., and it afterwards came into the plaintiff's hands. It was dated in 1794, and drawn at 91 days' sight. In 1800, the defendant having other effects of Cullen's in his hands, deposited them with Miller and Robertson, and Booth and Co., on an undertaking from them that they would return these effects whenever it should appear that they were exonerated from this bill. Cullen afterwards became bankrupt. The defendant was arrested, and then said he would apply to Cullen's assignees to bail him, for

* So the death; Poth. pl. 46; or drawee's imprisonment, constitutes no excuse for the neglect to give notice of non-acceptance or non-payment; *Haynes v. Berks*, 8 B. & P. 599. abridged post.

he had lodged property in America to answer the bill, and if he was discharged for want of notice, he should pay it over to them. Acceptance and payment were both refused, but no notice was ever given of it to the defendant. *Chambre, J.* nonsuited the plaintiff, on the ground that the defendant was discharged for want of notice; and on a rule nisi to set aside the nonsuit, and cause shown, the Court held that the special circumstances did not excuse the want of notice; that there was no fraud in the defendant, which was the ground for the rule for dispensing with notice; and that, when *Miller and Robertson*, and *Booth and Co.* were exonerated, which they were by want of notice, the money deposited with them belonged to *Cullen's* assignees.—Rule discharged.

22. *STAPLES V. OKINES.* E. T. 1795. K. B. N. P. 1 Esq. 332.

Action against the drawer of a bill. The defence was, want of notice. The plaintiff thereupon called the acceptor, who proved that when the bill was drawn, he was indebted to the defendant in more than the amount of the bill, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was therefore understood between them that the defendant should provide for it; and it was contended, that this superseded the necessity of giving the defendant notice. But *Lord Kenyon* held, that it did not, and nonsuited the plaintiff.

23 *BLACKHAN V. DOREN.* M. T. 1810. N. P. 2 Camp. 503.

Action against the drawer of a bill, of which acceptance had been refused. No notice of dishonour had been given; to explain which, it was stated that there was a general account between plaintiff and defendant; and that although when the bill was presented they had money of defendant's in their hands, yet that defendant was greatly indebted to them, and they had appropriated the money in hand in liquidation of their debt. *Lord Ellenborough* said, where a party draws a bill on a house with whom he has no account, there notice of dishonour is unnecessary, because the party cannot be injured by the want of it; but where parties have a fluctuating account, there notice is absolutely necessary, for the drawer cannot know whether or not his bill has been dishonoured without it.—Plaintiff nonsuited.

24 *CLARIDGE V. DALTON.* T. T. 1815. K. B. 4 M. & S. 226.

Defendant drew upon one *A. B.* a bill for 800*l.* dated the 29th of June, 1814, at two months after date. Defendant had supplied *A. B.* with goods to the amount of 200*l.*; and between June and September, he supplied him with 70*l.* worth more; but according to this course of dealing, the goods were to be paid for by acceptance at the end of the year. Defendant being sued by an indorsee, insisted upon want of notice. The point was reserved for the opinion of the Court, who now delivered judgment as follows. The case of *Bickerdike v. Bollman*, 1 T. R. 405, has established, that a party to whom a notice would be of no avail, shall not be entitled to require it. But this rule extends only to cases where the party has no effects, or is not likely to have effects, or has no expectation that he will have any, in which instances it is clear he could not be prejudiced by want of notice, the object of such notice being to enable the drawer to withdraw forthwith out of the hand of the drawee such effects as he may happen to have, or may stop those which he is in a course of putting into his hands. The question therefore, is, whether in this instance there were any funds in hand at the time of drawing, applicable to this bill, or a ground of reasonable expectation that, when the bill became due the drawee would come forward and pay it. As to funds, though there were goods of the defendant in the drawee's hands at the time of the drawing, yet they were not such as could be properly set against the drawing; and as to any reasonable expectation that the bill would be paid, the defendant did not draw the bill with any reasonable expectation that it would be accepted or paid; but on the contrary, with a pretty clear assurance that it would be dishonoured, for the bill was not drawn in the usual course of business, so as to justify an expectation that it would be paid. The defendant had no claim on the drawee to have it honoured, according to the due course of credit between

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ged other money which he had of the drawee's in the hands of the indorser, on an under taking by the indorser that he would re turn it whenever it should appear that he was exonerated from the bill. So if he has effects in the hands of the drawee at any time whilst the bill is running, he is entitled to notice of dishonour. So it is no excuse for not giving notice of dishonour, that the balance of a fluctuating account between drawee and drawer is against the latter. [464]
So if the vendor of goods, sold upon credit draws upon the purchaser a bill which would be due long before the expiration of the stipulated credit, he is not entitled to notice of the dishonour, because he had no right

to expect that the drawee would honour the bill.*

them, until the end of the year, whereas this bill, which is at two months, became due on the 1st of September. It was drawn, therefore, in anticipation of his credit, and without any assurance of accommodation; consequently, the necessity of giving notice was dispensed with. See 3 Campb. 164; 7 East. 359; 12 id. 177. 434; 15 id. 221. 16 id. 43.

25 WALWYN v. St. QUINTIN. M. T. 1796. K. B. N. P. 2 Esp. 516. more fully abridged, *ante*.

What are effects in the hands of the drawee, is a question for the jury.

In this case, Eyre, C. J. left it to the jury to say, whether title deeds, in the hands of a drawee, were effects or not; and they found in the affirmative.

See 2 A. & B. 240; S. C. 2 Rose. 141.

26. PHIPSON v. KNELLER. M. T. 1815. N. P. 1 Stark. 116; S. C. 4 Campb. 285.

If the drawer of a bill [465] say my residence is immaterial, and will inquire whether the bill is paid a notice is dispensed with.

This was an action against the drawer of a bill of exchange; and the question was, whether the plaintiff was excused for not having given him notice of the dishonour of the bill. It was proved that a few days before the bill became due, the defendant called at the counting-house of the plaintiff, whom he knew to be the holder; and being asked the place of his residence, he said he had no regular residence; he was living among his friends, and he would call and see if the bill was paid by the acceptor.

Per Lord Ellenborough. This dispensed with notice, and threw upon defendant himself the duty of inquiring if the bill was paid.—Verdict for the plaintiff.

27. BRETT v. LEVETT. H. T. 1811. K. B. 13 East. 213.

So an acknowledgment by the bankrupt, drawer of a bill of exchange to the holder, subsequent to his bankruptcy, that the bill would come back to him, or that it

The plaintiff in this case was assignee of one A. B. upon whose goods the sheriff of S. had levied an execution on a judgment obtained against him at the suit of a creditor. The plaintiff had brought an action against the sheriff for such levy; and two doubts had been started as to the validity of the petitioning creditor's debt, which arose from A. B.'s having drawn a bill of exchange, one of which is stated *ante*, vol. iii. 559. and the other consisted in attempting to impeach the proof of A. B.'s liability on the bill, on account of want of notice of its dishonour, it appearing that a witness had been called, who spoke of a conversation between the plaintiff and A. B. subsequent to the time of the bankruptcy committed, in which the plaintiff asked A. B. if the bill would be paid; who answered *no, that it would come back*; and it was contended that no evidence of any admission by the bankrupt, after the act of bankruptcy, could be received in evidence to do away the want of notice. But the learned judge before whom the cause was tried, overruled the objection, and received the evidence, which this Court agreed to be right, and refused the rule on that point. See 1 Esp. 168; 2 H. Bl. 279.

would not be paid by him, will dispense with the proof of notice of its dishonour.

28. PORTHOUSE v. PARKER AND OTHERS. M. T. 1807. N. P. 1 Camp. 82.

So an acceptor who is one of the drawers, is not entitled to notice of dishonour.

In this case, which was an action against defendants as drawers of a bill of exchange, Lord Ellenborough observed, that where the acceptor is one of the drawers, there is no necessity to prove notice of dishonour, as he must know, or will be presumed to have knowledge of all the circumstances.

29. HILL v. HEAF. London Adjourned Sittings after M. T. 1823. 1 D. & R. N. P. C. 57.

Where, before a bill became due, notice was given by the drawers to the drawees, not to pay if presented held that it amounted to a dis

Assumpsit by payee against drawer of a bill. The declaration averred due notice of non-payment to the drawer, but no evidence was given in support of that averment, the fact being that no notice of non-payment was given; but it appeared that the defendant had given orders to the drawees not to pay the bill if presented; and that those orders had been communicated to the plaintiff. It was contended that the order not to pay was a dispensation of notice of dishonour, because it necessarily betrayed a consciousness that it would not

* So where the drawer has sold and shipped goods to the drawee, and drew the bill before they had arrived, and the drawee, not having received the bill of lading, refused to accept the goods, because they were damaged, and who refused to accept the bill, it was decided; we have seen, that the drawer was discharged for want of notice; Rucker v. Hiller, 16 East. 48; S. C. 3 Campb. 217. abridged *ante*, 454.

be paid ; which had in various cases been held to deprive the drawer of his right to such notice. *Abbott, C. J. allowed the validity of such argument. See 4 Campb. 285 ; 1 Stark. 116 ; 13 East. 214 ; 1 Camp. 82.*

30. *CROSSE v. SMITH. E. T. 1813. K. B. 1 M. & S. 544.*

*Smith and Co. had a bill for 3176*l.* drawn by Fea and Co. accepted by Tuke, payable at Smith, Payne and Smith's, due 12th of April, 1810. This bill they remitted to Smith, Payne and Smith, their correspondents. Tuke banked with Smith and Co. On the 6th of April, Tuke directed Smith and Co. to write to Smith, Payne and Smith, not to pay this bill. They did so ; and when the bill was due, it was protested, and sent to Smith and Co. at Hull. Fea and Co. had a counting house at Hull, where they were merchants, and one lived within a mile, and the other within 23 miles of Hull. The morning after Smith and Co. received the bill, their clerk went to give notice, and called at the counting house of Fea and Co. about half after ten. Fea and Co. became bankrupts, and their assignees insisted that Smith and Co. had made this bill their own, and were not entitled to carry it to the debit of Fea and Co. because they ought to have given notice of the directions they received from Tuke to prevent payment by Smith, Payne and Smith. On a case reserved, the Court held, that Smith and Co. were not bound to have given notice of the directions they had received ; and that it would have been a breach of confidence in them to have done so.*

pensation of the notice of dishonour.

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Though the indorser of a bill receive directions from the acceptor to send word to the house at which it is payable, to forbid its payment, and he does so, he is not bound to give any notice of those directions to any of the parties to the bill.

31. *TURNER v. LEECH. E. T. 1821. K. B. 4 B. & A. 451. S. P. MARSH v. MAXWELL. T. T. 1809. K. B. 2 Campb. N. P. C. 209. contra. CUTLER v. BODY. K. B. 1819. Chit. Bills, 406. 6th edit.*

Plaintiff was the 11th indorser of a bill, defendant the eighth. Plaintiff indorsed it to Bennett, Bennett to Fletcher, Fletcher to Hordein, and Hordein to Samsom and Co. It was dishonoured on Saturday the 30th of August, and on Monday 1st of September, Samsom gave notice to Hordein, this reached Hordein on the 2d, and the same day he gave notice to Fletcher ; Fletcher sent notice to Bennett on the 3d, and this notice reached Bennett on the 4th. He did nothing till the 8th ; and then he gave notice to plaintiff, who paid the bill. Plaintiff sued defendant ; and on a case reserved, plaintiff urged that Bennett's laches had not discharged defendant, because defendant had notice as soon as he would, had each party between him and Samsom taken the time the law allowed him ; but the Court was clear that defendant was discharged, and gave judgment accordingly.

But where an indorser of a dishonoured bill, which a subsequent holder by laches had made his own, afterwards paid it, and gave notice to a

prior indorser, who could not have been entitled to earlier notice, if the proper successive notices had been given by all parties, held that he paid it in his own wrong, and by so doing he could not place the prior indorsers in a worse situation than they would otherwise have been.

32. *BATEMAN v. JOSEPH. T. T. 1810. K. B. 12 East. 433 ; S. C. 2 Campb. 461. S. P. BROWNING v. KINNEAR. H. T. 1819. C. P. N. P. Gow. 81.*

*In an action by an indorsee, against the payer and first indorser of a bill, it appeared that the plaintiff received notice of its dishonour on the 30th of September, in time to have given notice to the defendant on that day ; he gave no notice, however, until the 4th of October, to excuse which his clerk proved that the plaintiff did not know the defendant's residence until that day. Lord Ellenborough left it to the jury, whether the plaintiff had used due diligence to find the defendant's residence. They found for the plaintiff, and on motion for a new trial, the Court refused the rule, saying, whether due notice had been given was a question of law ; but whether due diligence had been used to discover the residence of a person entitled to notice, was a question of fact. See *vide Whit. 76 · Poth. pl. 144.**

Where the residence of the indorser of a bill of exchange is unknown to the holder, the latter is excused from giving notice to the former of its dishonour, yet it must appear to the satisfaction of a jury that due diligence has been used to discover it.

33 *STURGES v. DERRICK. E. T. 1810. Ex. Wightw. 76.*

*The plaintiffs in this case were bankers at Bath, and indorsers of a promissory note, and the defendant, the indorser, living at Bedminster, near Bristol. At the trial verdict was found for the plaintiffs. The facts of the case were these. On the 23d. of September, 1808, the note in question was drawn by one Hull for 65*l.* payable one month after date to the defendant or order, who indorsed it over to the plaintiffs on the 26th of October ; when the note*

It has nevertheless been held sufficient, when a note has been dishonoured, to make inquiries at the drawer's house or the residence of the payee.

became due, their clerk went to the drawer's house in Bath, and left notice that the note was due, and on the next day the drawer sent to the plaintiffs to say that he would call and take it up; the plaintiff's clerk inquired of Hull's son where the defendant lived, who said he did not know, and it was not till the 1st of April that the plaintiff found out where the defendant lived. Hull at the trial said, that he did not know where the defendant lived; he said also that he himself absconded about that time, and that upon his return he found the bankers inquiring after the defendant's residence. Hull was declared bankrupt in the month of February, and the plaintiffs had received a dividend of five shillings in the pound. At the trial the defendant first endeavoured to prove that the drawer had himself taken up the note. On a rule calling upon the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had, upon the grounds that the plaintiffs had not used due diligence in inquiring after the defendant's residence; the Court seemed inclined to think that the defence of payment would be a waiver of the laches, if any; but without going into that, they thought sufficient diligence had been used.

34 BEVERIDGE v. BURGIS. T. T. 1812. N. P. 3 Campb. 262.

But the preceding authority seems questionable.

In an action by the indorsee against the indorser of a bill, to excuse want of notice, plaintiff stated that defendants address did not appear upon the bill, that he had made inquiries at the house where it was payable, but was unable to ascertain it. Lord Ellenborough said it was plaintiff's duty to have made inquiries of some of the parties to the bill, and referred to the directory, and made application to persons of the same name. Ignorance of the indorser's abode, in many cases, might excuse the want of due notice; but the party must show he has exercised reasonable diligence to find it out, which in the present case he has not done.—Plaintiff nonsuited.

35. THACKRAY v. BLACKETT. M. T. 1811. N. P. 3 Camp. 164.

The drawer of a bill which is destroyed by [468] accident is entitled to notice of non-payment, though he has refused to give a new bill according to the 9 & 10 W. 3.c.17. s. 3. and though he knows the drawee is bankrupt.

Action by the indorsee of a bill of exchange against drawer. It appeared the bills, before they were due, were left for payment at the acceptor's, who by mistake destroyed them; notice of the fact was given to the defendant, and a request made for new bills according to the stat. 9 & 10 W. c. 17. which defendant refused; in a few days the acceptors became insolvent, but the bills were presented for payment as they became due, but no regular notice of dishonour was sent to defendant. Lord Ellenborough, C. J. said, the insolvency of the acceptor did not dispense with the necessity of notice of dishonour; the destruction of the bills did not alter the case, because they might have been with or without an indemnity; and that as the defendant, not having notice of dishonour, might have been prevented from prosecuting his remedy against the acceptors, plaintiff must be nonsuited.

(b) *Within what time to be given.**

1 TINDAL v. BROWN. E. T. 1786. K. B. 1 T. R. 167.

In an action by the indorsee against the indorser of a promissory note, it appeared the defendant had, within a reasonable time after default of payment of a note, received notice thereof from the maker; but the plaintiff, the holder had not given the defendant notice until two days after the bill became due. On this ground the Court held that the plaintiff could not recover, and that due notice ought to be given by the holder himself to the indorser, within a reasonable time after default of payment; and Buller, J. observed, that the purpose of giving notice to the indorser, is not merely that the indorser should

The holder of a bill or note must give notice of the dishonour within a reasonable time.

* To such of the parties as reside in the place where the presentment was made, the notice must be given at the expiration of the day following the dishonour; to those who reside elsewhere, by the post of that or the next day. Each party has a day for giving notice, and he will be entitled to the whole day, though the post by which he is to send it goes out within the day. If the holder place the instrument in the hands of the banker, the banker is only bound to give notice of its dishonour to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice. And the customer has the like time to communicate such notice as if he had received it from a holder. These general rules are illustrated and confirmed by the cases abridged in the text.

know that the note is not paid, for he is chargeable only in a secondary degree but to render him liable you must show that the holder looked to him for payment, and gave him notice that he did so. The notice by another person to the indorser can never be sufficient, but it must proceed from the holder himself.

2 **DARBISHIRE v. PARKER.** H. T. 1805. K. B. 6 East. 3; S. C. 2 Smith. 195. Whether the question of what is a reasonable time of notice of the dishonour of a bill in those cases in which it is required, in order to render the parties collaterally liable, responsible upon the default of the acceptor, was a question of law or of fact, Lawrence, J. expressed himself as follows; I certainly admit this is a question of law compounded with fact; but when the facts are found, it is a mere question of law, and the jury are not to be left to decide it wholly of themselves, but are to take the directions of the judge. The case of *Metcalf v. Hall* (Doug. 497.) and also the case of *Bull, Nisi Prius*, 274. 278, one where the jury [469] struggled against the opinion of the judge; and the other where it was doubted, whether 15 days of notice was not allowed, were both relied on in *Tindal v. Brown* (1 T. R. 167; 6id. 186;) and in that very case of *Tindal v. Brown* the question came before the Court on a special verdict, and the jury did not find any thing as to the reasonableness of the time. They only found the facts, and judgment was given in the court without more argument. But it was necessary for the jury to say what was a reasonable time for the notice, there ought to have been a *venire de novo*. Willa, C. J., in his report, p. 206. says, an issue may be joined on things which are partly matters of fact and partly matters of law; and then, when the evidence, is given at the trial, the judge must direct the jury how the law is; and if they find contrary to the direction of the judge, it will be a sufficient cause for a new trial. And the same doctrine is laid down in 2 Lord Raymond, 1485-94. that the jury in matters of law, must take the direction of the judge. And, indeed, it is so in all cases.

3. **HILTON v. SHEPHERD.** E. T. 1796. K. B. 6 East. 14. n. S. P. **HOPES v. ALDER.** M. T. 1800. K. B. 6 East. 16 n.

In this case it appeared, that a bill of exchange passed through the hands of five persons, all of whom lived in London or the neighbourhood; and that the bill, when due, being dishonoured, the holder gave notice on the same day to the fifth indorser, and he on the next day to the fourth, and he on the next day to the third, and he on the next day to the second, and he on the same day to the first. In an action commenced by the second indorser against the first indorser, a verdict was found for the plaintiff; to set aside which a rule nisi had been obtained. on the ground of a misdirection by the judge, at the trial, in point of law, he having stated to the jury, that it was a question for them to consider, whether, under the circumstances, the plaintiff had been guilty of any laches or negligence. Cause was shown against the rule; when it was contended, that whether due notice had been given in reasonable time, must, from the necessity of the thing, be a question of fact, for the consideration of the jury. That it depended upon a thousand combinations of circumstances which could not be reduced to rule; if the party were taken ill; if he lose his senses; if he were under duress, &c. how could laches be imputed to him? Suppose he were prevented from giving notice within the time named by a physical impossibility? Such a rule of law must depend upon the distance; upon the course of the post; upon the state of the roads; upon accidents; all which it is absurd to imagine. Lord Kenyon; C. J. said, I cannot conceive how this can be a matter of law. I can understand that the law should require that due diligence shall be used; but that it should be laid down that the notice must be given that day or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived that, whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances of the accident, necessity and the like. This, however, is a question very fit to be considered, and when it

Or of fact for the jury to determine has been much discussed.

But the better opinion appears to be, that it is a compound proposition of law and fact.

The time at which the notice was given, cannot be left to inference; there must be positive proof.

goes down to trial again. I shall advise the jury to find a special verdict I find invincible objections, in my own mind, to consider that the rule of law requiring due diligence is tied down to the next day

4. TINDAL V. BROWN. E. T. 1786. K. B. 1 T. R. 167. S. P. POPLEY V. ASHLEY. E. T. 1703. K. R. 6 Mod. 147; S. C. Holt. 121.

Per Lord Mansfield, C. J. What is a reasonable time is partly a question of fact, and partly a question of law. It must depend on the circumstances. But per Ashhurst and Buller, Js. Whether the post goes out this or that day, at what time, &c. are matters of fact; but when these facts are established. it becomes a matter of law

5. LAWSON AND OTHERS V. SHERWOOD. E. T. 1816. N. P. 1 Starkie. 114.

Action by the indorsee against the indorser. It was proved that notice of the dishonour had been given, but not whether it was given two or three days after the presentment. Lord Ellenborough said, there must be positive evidence that notice was given in due time; it could not be presumed; and that the *onus probandi* lay upon the plaintiff.—Plaintiff nonsuited.

6. BURBRIDGE V. MANNERS. H. T. 1812. N. P. 3 Campb. 193.

It may be given on the day the bill becomes due, immediately on refusal of payment, without waiting to see whether it will be taken up during the day.*

Action by indorsee against the payee of a promissory note. It appeared the note was presented for payment on the forenoon of the day it became due, and payment was refused; in the afternoon of that same day, plaintiff gave notice of dishonour. Defendant's counsel contended, that the notice of dishonour was premature, because the maker of a note had the whole of the day on which the bill became due to pay it. But Lord Ellenborough said, a note is dishonoured the instant payment is refused, although such refusal be made on the day the bill becomes due; and a party cannot complain of the extraordinary diligence used to give him notice.—Verdict for plaintiff.

7. SMITH V. MULLET. T. T. 1809. 2 Campb. 208.

All the parties have one day to give notice: but putting the notice into the twopenny post at five o'clock on the second day is insufficient.

Assumpsit against the indorsers of a bill. The bill became due on Saturday. One D. gave plaintiff notice of dishonour on Monday, whose clerk put a letter into the twopenny post, after five o'clock on Tuesday evening, giving notice to C. The letter being too late for that evening delivery, was received on Wednesday morning. On the question whether the notice of dishonour had been given, Lord Ellenborough observed, It is important that there should be an established rule on this subject, and I think there can be none more convenient than that, where all parties reside in the same place, each has a day to give notice. Reasonable expedition has not therefore, been used in the present case, for the plaintiff had notice on Monday, and he omitted to give notice to his indorsers until Wednesday; for putting a letter into the post on Tuesday, at five o'clock, was equivalent to sending it on Wednesday, since it could not be delivered before that day. Plaintiff has consequently lost one day, and for these *laches* defendant is discharged.—Plaintiff nonsuited.

[471] 8. WRIGHT V. SHAWCROSS. 2 B. & A. 501. n. a. S. P. BRAY V. HADWEN. E. T. 1816. K. B. 5 M. & S. 68.

But where a letter, in intimating the dishonour of a bill, reached the holder on a Sunday, the Court held that he was

Plaintiff received notice by a letter, on a Sunday, of the dishonour of a bill. He did not send notice to defendant till Tuesday's post, which set out in the evening. He might have sent it in the evening of Monday, by the Monday's post. But on motion for a new trial, after verdict for plaintiff, the Court held, plaintiff was not bound to open the letter till Monday, nor bound to send notice till the Tuesday, and therefore refused the rule.

not bound to open it until the Monday, and that he had not been guilty of *laches* by delaying to send notice until Tuesday's post.

9. LINDO V. UNSWORTH. H. T. 1811. N. P. 2 Campb. 66.

And the same rule applies to a Jewish festival.

Assumpsit by the indorsee against the maker of a bill of exchange. The bill was noted for non-payment on the 8th, but plaintiff being a Jew, and the 8th being a festival, which forbids any persons of the Jewish persuasion to attend to business, notice of dishonour was not given until after post time on the 9th; the question was, whether plaintiff was excused by not giving notice on

* The usual practice is to present such a bill in the course of the morning, and if refused in London, for a notary; see 4 T. R. 170; to present it again in the evening.

the 8th, on account of his religion ; and Lord Ellenborough held that he was, and observed that we were not compelled to give notice of dishonour on our Sabbath, and the same indulgence ought to be observed to the professors of another religion.—Verdict for plaintiff.

10. JAMESON v. SWINTON. H. T. 1810. C. P. 2 Taunt. 224.

The question in this case was, whether due notice of the non-payment of a bill of exchange had been given to an indorser. It appeared that the bill was dishonoured on the 10th of July ; the last indorser, who lived in Holborn, having had notice of the same about four o'clock in the afternoon of that day, sent notice on the next day to the defendant, a prior indorser, who resided at Islington, and who received it about eight or nine in the evening. The Court held this due notice, and the rule nisi for a new trial moved for was refused.

11. HAYNES v. BIRKS. H. T. 1804. C. P. 3 B. & P. 599.

The plaintiff, being holder of a bill of exchange, indorsed to him by the defendant, placed it in the hands of his bankers, who, having presented it on Saturday at the acceptor's house, it was refused payment, and by them noted, and presented again by a notary between nine and ten o'clock in the evening, when it was found that the acceptor was in the King's Bench prison. On Monday, the holder, who lived at Knightsbridge, had notice of its dishonour from his bankers, and notice was left at the residence of the defendant in Tottenham Court Road, at noon on the following day. The question was, whether the plaintiff had given notice within a reasonable time. The plaintiff had a verdict, open to a motion by the defendant for leave to enter a nonsuit. On [472] motion for that purpose, Lord Alvanley, C. J. said ; the defendant's counsel has cited the cases of Tindall v. Brown, 1 T. R. 167. and Nicholson v. Gouthit, 2 H. Bl. 609. to show that neglect in a holder of a bill to give notice for the space of three days is such laches as will discharge the parties otherwise liable. But this case is clearly distinguishable from those, as a Sunday intervened, and notice could not be given by the bankers to the plaintiff after the presentment by the notary on Saturday evening. To this argument it has been objected, that the plaintiff had occasioned the delay by deputing a banker to transact business, that he himself might have negotiated ; but if we admit this reasoning, we should virtually put an end to the practice of presenting bills through the agency of a banker, which would greatly militate against the public interest. Now, allowing the agency of the banker, it has been shown that the holder, as soon as he could conveniently, gave notice to the defendant, which he might do at any time during the day, and by letter ; and as to the precise time when the defendant received it, we cannot distinguish as to a fraction of a day.—Motion refused.

given to the holder on Monday following, and he, who resided at Knightsbridge, gave notice to the indorser, who lived in Tottenham-court-road, on Tuesday, the Court held it notice within reasonable time.

12. BALDWIN v. RICHARDSON. H. T. 1823. K. B. 1 B. & C. 245 ; S. C. 2 D. & R. 285.

The traveller of plaintiffs, tradesmen in London, upon receiving a bill of exchange in payment of a debt due to his principal from M. of Derby, paid it away to the traveller of B. The traveller of B. transmitted the bill to his principal, but did not communicate to him the names of the person from whom he received it. B. paid it to his bankers. The bill was dishonoured on the 3d of April. On the 5th B. received notice of the dishonour, but not knowing it, and the parties to the bill, he wrote to his agent for information, who being then at Edinburgh, did not receive the letter until the 10th, when notice was sent to the plaintiffs, and by them received on the 13th ; on the 14th plaintiffs wrote to B. for the bill, and received it on the 16th, and by that day's post gave notice to A. the original indorser. The question which now engaged the attention of the Court was, whether there had been such laches as would discharge A.'s liability as indorser. The court said, the plaintiffs in this case appear to have used due diligence in giving notice to A. after they were informed of the fact of the dishonour of the bill. The intermediate delay which took place

the defendant of the dishonour of the bill when he ascertained his residence, which it appeared he wrote immediately to his agent to learn. [473] So where a bill is returned for non-payment to a party residing in the country, and the post goes out so soon on that day as to render it impossible, or very inconvenient to give notice to the drawer by the next post on the same day, it may be an excuse for not sending notice to him by that post, (but it must at any rate be sent by the next following post, and it will not be good if sent by a private hand on the next day, and it does not arrive till after the post.)

necessarily arose from the manner in which the bill was circulated. See 14 East. 433 ; 1 T. R. 712.

13. DARBYSHIRE V. PARKER. H. T. 1805. K. B. 6 East. 3 ; S. C. 2 Smith. Rep. 195.

This was an action against the defendant, as guarantee for one A. B. for the payment of the price of certain goods delivered to him ; but the sole question in this cause arose upon the point whether due notice had been given by the plaintiff to A. B. of the dishonour of a bill of exchange drawn by A. B. on one C. D. in London, and paid by him A. B. to the plaintiff at M. At the trial it was proved that the defendant undertook to guarantee the payment for the goods, which were to be paid for by the above bill. It became due on the 9th of August, 1803 ; and being then dishonoured, the holders in London transmitted notice thereof to the plaintiff at M. The post arrived at M. about midnight on the 11th, or early in the morning on the 12th, and the letters were delivered out about seven or eight in the morning. It left M. for K. (where A. B. resided) on the same day about twelve at noon, so that there was about four or five hours time for him to transmit notice to A. B. on that day. The post arrives at K. from M. about seven in the evening of the same day ; and between nine and ten of the same night, that is, within a few hours sets out again for L. The plaintiff did not write by post on the 12th, but sent the bill by a friend on the 13th, and he accordingly gave notice to A. B. on that day about nine in the evening. It appeared on the trial, that the notice was received by A. B. so late on that day, that, although he immediately wrote a letter, and ran with it to the post, he could not get it in, being so much agitated with the notice of the dishonour of the bill ; and there was some doubt upon the trial, whether, if he had not been so, he might not have got the letter in the post in due time. There was no evidence that the delivery of the letters at K. takes place immediately upon their arrival, so as to show that A. B. would have received it earlier. It was left to the jury to say, whether this notice was in due time. The judge said, it was not necessary that the plaintiff should immediately, on the receipt of the letter from L. give up all other business, in order to write to M. ; and that, as in L. the holder had till the post time on the 10th, when the bill was dishonoured on the 9th, so, by parity of reasoning, the holder at M. would have till the next day, after he received the notice, to transmit notice to K. which would be on the 13th of August, and therefore this notice might be good.—Verdict for plaintiff. Rule nisi for a new trial. *Per Cur.* The notice which has been given is insufficient. The law on this subject seems to be very well ascertained in what is laid down by Lord Mansfield and Lord Alvanley in the cases cited. (3 B. & P. 599 ; 2 H. Bl. 365. See 1 T. R. 167 . and 6 id. 186.) What is reasonable notice is a question of law compounded with fact to be left to the jury. Both of them say that the notice should be by the next post, where the parties live at a distance ; but it is impossible to give notice by the next post, if it goes out almost the next minute, as in some places it may do. They must therefore mean the next convenient post by which the notice may be sent ; and here, though the party might have some excuse for not sending the notice on that day, yet he ought to have used reasonable diligence, and ought to have sent it by the next days post, instead of sending it by a private hand.—Rule absolute.*

14. DARBYSHIRE V. PARKER. H. T. 1805. K. B. 6 East. 3 ; S. C. 2 Smith. 195. S. P. WILLIAMS V. SMITH. E. T. 1819. K. B. 2 B. & A. 496.

[474] The words 'next post,' contained in the rule which has been adopted by the courts, that the holder of a disho-
In this case, in which the question came before the Court, whether notice had been given by the holders of a bill of exchange to the drawer, of its dishonour, within a sufficiently reasonable time, Lord Ellenborough, C. J. observed ; reasonable diligence in giving the notice in these cases ought to be deemed sufficient, unless the party can show that he has been damnified. There is a general position in the books upon the subject, as in Marius, for

* This cause was afterwards again tried, when a verdict was found for the plaintiff, it being proved that the letter was delivered by the private conveyance as early as it would have been delivered by the post had it been sent on the 13th ; vide 2 Smith Rep. 202.

instance, that the notice to the drawer, or other party, on the bill, ought to be sent by the next post. But I am of opinion, that by the next post you must understand the next reasonable convenient post, otherwise the holder of the bill would have less time to give notice in the country, or to his correspondent abroad, than he would if the drawer lived in the same town. There is, however, nothing in the decided cases, as a rule strictly applicable to this case; but certainly it cannot be understood, that, let the next post go out when it may you are to send it, at all events, by that conveyance. If it were so, every man must be nailed, as it were, to the post-house, to open the letters immediately as they arrive, and must lay aside all other business in order to answer them, or dispatch a notice to his indorser or the drawer immediately. If indeed there is an interval of four or five hours between the coming in and going out of the post, it may be a fit question for consideration, whether the party ought or ought not to send by the next post. But here he did not send by the post of the day on which he received notice himself, nor even by the post of the next day, but by a private person, and it was not delivered till after the letters by the post.

honoured bill living at a distance from the drawer, must give notice of such dishonour by the next post, meaning in all cases the next convenient post.

15. **BANCROFT v. HALL.** Lancaster Assizes. 1816. N. P. Holt. 476. Action against the drawer of a bill of exchange, who resided at A. The defendant indorsed the bill to plaintiff, which was accepted by B. payable at C. The bill being dishonoured, plaintiff, who resided at D. had notice of that circumstance on the 24th May, and sent a letter to that effect to his agent at E. by a private hand, though the mail had previously left, desiring him to give defendant notice of the acceptor's default. On the 25th, the agent attended at the defendant's counting-house, about six in the evening, which was shut up, the next day being Sunday. The agent did not in fact give defendant notice until the 27th. Defendant's counsel contended, that the notice was not in time; but Bayley, J. said, it was true notice must be given in time, but all a man's other business is not to be neglected to give the most expeditious notice. A party is not bound to send by post as the only conveyance, or by the first opportunity which offers. The notice given in this case is quite sufficient; no conveyance could have brought it sooner.—Verdict for the plaintiff.

However, the holder is not in general bound to send notice by the post; it is sufficient to send it by a private conveyance provided it arrive at the same time it would have reached the party by post.

(c) *Form of the notice, in what manner, and by and to whom to be given.*

[475]

1. **HARTLEY'S CASE.** T. T. 1825. K. B. 4 B. & C. 339.

No particular words are essential to be

Indorsee against drawer. The notice of dishonour addressed to the defendant stated, "I am desired to apply to you for the payment of the sum of the 150*l.* due to myself on a draft drawn by Mr. C. on Mr. C., which I hope you will on receipt discharge, to prevent the necessity of law proceedings." *Per Cur.* Although no precise form of words is necessary to be used in such notices, yet it must be such as will convey to the defendant knowledge that the bill has been refused payment.

tial to be used in the notice, but it must contain an intimation that payment of the bill has been refused by the acceptor.*

2 **FORSTER v. JURDISON.** T. T. 1812. K. B. 16 East. 105.

Indorsee against drawer; when payment was refused by the acceptor, plaintiff apprised defendant thereof, but added, he had reason to believe a friend would advance the money for the acceptor in a few days; that he would therefore hold it till the end of the week without putting more expense upon it, unless he heard from the defendant to the contrary. The bill was not paid, but no further application was made to defendant for near two months. At the trial of the action, Wood, B. being of opinion that plaintiff should have given a second notice at the end of the week, and the jury thinking that certain circumstances proved, did not amount to a waiver of the want of such notice, a verdict was found for defendant; but on a rule nisi for a new trial, and cause shown, the Court thought that the plaintiff had done all the law merchant required by giving one notice; that he then at the highest made himself agent for defendant, to endeavour to get payment; and if any damage resulted to defendant for want of notice, it might perhaps entitle him to call upon

Where the holder of a bill of exchange, which had been refused payment by the acceptor, gave notice thereof to the drawer, but inform

* And it has been decided that it is not enough to state in the notice that the drawee refuses to honour, but that it must go farther, and express that the holder does not intend to give credit to the drawee; see 1 T. R. 169; vide post, 478.

him that he had reason to be

Have it
would be
taken up in

the plaintiff as his agent by action, but that it was no defence to the action upon the bill.—Rule absolute.

a few days, and offered to retain the bill till the end of the week, unless he received instructions to the contrary, held that such conditions did not discharge the drawer, although no further notice of non-payment was given.

A notice to
an indorser
in the
following
terms, "I
give you
notice that
a bill, &c.
drawn by
you, &c. is
dishonoured," is in
sufficient.

3. *BEAUCHAMP v. CASH*. Westminster Adjoined Sittings, after Hilary Term, 1822, Coram Abbott, C. J. D. & R. N. P. C. 3.

This was an action by the indorsee against the indorser of a bill of exchange. A copy of the notice of the dishonour of the bill, sent by the plaintiff to the defendant, was put in as follows, "I give you notice that a bill for, &c. drawn by you, upon &c. lies at my banking house dishonoured." It was urged that such notice was insufficient, as the defendant was the indorser, and not the drawer of the bill. Abbott, C. J. acquiesced, and nonsuited the plaintiff.

4. *CROSSE v. SMITH*. E. T. 1813. K. B. 1 M. & S. 544.

[476]
Sending a
verbal no-
tice to the
drawer's
counting-
house dur-
ing the
hours of bu-
siness, is
sufficient.

Per Cur. Notice to the drawers of non-payment of a bill of exchange by sending to their counting house during the hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. The counting-house is a place where all appointments respecting the business, and all notices, should be addressed. And it is the duty of the merchant to take care that a proper person be in attendance. Putting a letter into the post is only one mode of giving notice; but where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode.

5. *GOLDSMITH v. BLAND*. E. T. 1800. C. P. Cited Bayley on Bills. 4th edit.

And if no
person be
in atten-
dance it is
not necessa-
ry to leave
or send a
written
one.

The plaintiffs sued the defendants as indorsers of two foreign bills, and to prove notice the plaintiffs showed that they sent a clerk to the defendants' counting-house, near the Exchange, between four and five o'clock in the afternoon; nobody was in the counting-house; the clerk saw a servant girl at the house, who said, that nobody was in the way, and he returned, having left no message with her. Lord Eldon, C. J. told the jury that if they thought the defendant ought to have had somebody in the counting-house at the time, he was of opinion that the plaintiffs had done all that was necessary by sending their clerk; that the notice was in law sufficient, if the time was regular. Verdict for plaintiff.

6. *CROSSE v. SMITH*. E. T. 1813. K. B. 1 M. & S. 545.

But telling
a man's at-
torney that
a bill is dis-
honoured is
no notice,
unless the
attorney
has more
than usual
powers.

In appeared in this case that a bill of exchange having become dishonoured, attempts had been made to give personal notice to the parties liable thereon, but that such efforts had been in vain; that in fact the party who went to the counting house of the drawer, in order to give notice, found the outer door open, the inner one locked; that he knocked so as he must have been heard had any one been there; that he waited two or three minutes, and went away; that on his return he saw the drawer's attorney, to whom he communicated the circumstance; that the next morning he went about the same hour, but with no better success; and that no written notice was left, nor was any notice sent to the residence of any of the partners. Upon a case reserved, Lord Ellenborough held that going to the counting-house at the time it should have been open, was sufficient, and that it was unnecessary to leave a written notice, or to send to the residence of any of the parties. Yet he observed that the notice to the attorney must be considered as going for nothing, because he was not the proper person to receive such a notice.

7. *KUFH v. WESTON*. M. T. 1799. K. B. N. P. 3 Esp. 54.

[477]
Sending no
tice of dis-
honour by

Action by the indorsee against the indorser of a foreign bill of exchange, drawn at Genoa; defence, that due notice of its dishonour had not been given. It was proved that the bill had been put into the post-office at London the third day after it was received from the defendants, which was the first Italian post day after it was received. It was farther proved, that, from the disturbed

state of Italy for some time before, the regular post had been interrupted, and the post,* the bill had not arrived at Genoa till a month after it became due; that it was immediately presented for acceptance, which being refused, it was protested, and the protest sent off immediately by the post to England. Lord Kenyon, C. J. said, as the plaintiffs had sent the bill by the ordinary course of the post, they had done all they were called on to do; they could not foresee that the post would be interrupted, and it could not be expected they should send a special messenger.

8. SAUNDERSON V. JUDGE. E. T. 1795. C. P. 2 H. Bl. 509.

The holder of a note wrote to the defendant, who was one of the indorsers, to say it was dishonoured, and put the letter in the post; but there was no evidence that the defendant ever received it; and the Court held, that sending the letter by the post was quite sufficient.

9. SCOTT V. LIFFORD. E. T. 1808. K. B. 9 East. 371; S. C. 1 Campb. 246.

S. P. LANGDALE V. TRIMMER. E. T. 1812. K. B. 15 East. 291. S. P.

BRAY V. HADWEN. E. T. 1816. K. B. 5 M. & S. 68.

A bill, due on the 4th of June, was presented on that day by A. B. and Co., the plaintiff's bankers, who lived in London. The plaintiff lived in London also; and they gave him notice on the 5th. The defendant (the drawer) lived at Shadwell; and on the 6th the plaintiff sent him notice by the twopenny-post. Lord Ellenborough left it to the jury, whether the plaintiff had communicated the notice in reasonable time; and they thought he had. And on a motion for a new trial, Lord Ellenborough said he could not say that the plaintiff, *omissis omnibus aliis negotiis*, was bound to post off immediately with notice; it was sufficient if reasonable diligence had been used. The Court thought the verdict correct, and refused a rule.

10. PEARSON V. CRALLAN. E. T. 1805. K. B. 2 Smith. Rep. 404.

Assumpsit on a bill of exchange for 30*l.*, indorsed by the defendant to the plaintiff. The plaintiff demanded the amount of the bill, and 2*l.* 12*s.* 9*d.* costs. The defendant tendered 31*l.* 11*s.* 9*d.* The expense incurred was on account of a messenger employed in giving the notice of non-payment. The defendant objected that the holder of a bill was not entitled to give notice by a special messenger, but only by the ordinary course of the post. It was agreed, that if a special messenger should be allowed, it was not an unreasonable charge. The 31*l.* 11*s.* 9*d.* having been tendered, and that fact pleaded; and this objection having been made to the legality of the charge, the defendant's counsel contended that the plaintiff should be nonsuited; but the learned judge overruled the objection, and expressly left it to the jury to say whether the sending by a special messenger was done wantonly or not; and it appeared that the letter possibly would not have reached the defendant for a fortnight, as he lived out of the usual course of the post; and upon this the jury found a verdict for the plaintiff for the amount of the bill, and the full charge for the expences; and Lawrence, J. said, "in some parts of Yorkshire, where the manufacturers live at a distance from the post towns, the letters may lie a long time before they are called for, and it may be necessary to send notice by a special messenger;" and Lord Ellenborough, C. J. observed, "that it was rightly left to the jury, if it was left to them to say whether the special messenger was necessary; and also whether the charge was reasonable."—Rule nisi refused.

* Where notice is sent from London by the general post, it has been held that the letter containing it should be put into the post office in Lombard-street, or at a receiving house, and that the delivery to a bellman in the street will not be sufficient; *Hawkins v. Rutt*; *Peake N. R.* 186. abridged ante, tit. Bellman; see *Hancock v. Noakes*, *Peake*, 67.

† But there is considerable risk in sending notice by a private hand where there is a regular post; for if the notice arrive later by the former than by the latter, the parties may be discharged; see *Darbyshire v. Parker*, 6 East. 8. 9. It has, indeed, been decided, that the holder of a dishonoured bill is not bound to send notice to the drawer by the mail, or first conveyance that sets out, it is sufficient provided there be no essential delay to send notice by a private hand; *Bancroft v. Hall*, *Holt. N. P. C.* 476. abridged ante, p. 473.

The notice of dishonour it has been said must be given by the holder himself,* or his authorized agent, and not by a mere stranger.

11. **STEWART V. KENNETT.** T. T. 1809. 2 Camp. 178. S. P. **TINDAL V. BROWN.** E. T. 1786. K. B. 1 T. R. 167.
Assumpsit on a bill of exchange. It appeared, notice of dishonour had been given by C. D., who had been employed to get the bill discounted for some of the original parties. It was not shown that he had any authority, from any party to the bill, to give notice of dishonour. It was contended, that the notice was sufficient, because the party who gave the notice must be considered as the authorised agent; but Lord Ellenborough said, if you can make C. D. the agent of the holder, the notice would be sufficient; but as he is in reality nothing more than a mere stranger, it is defective, since it should have come from the holder, or his authorised agent.—Plaintiff nonsuited.

12. **WILSON V. SWABBY.** E. T. 1815. 1 Starkie. 34.
 Action by indorsee against drawer of a bill of exchange. Notice of dishonour had been given to the defendant by one of the indorsers of the bill, but not by the party who sued, which defendant's counsel insisted was necessary; but Lord Ellenborough held, notice from any party to the bill was good.

13. **SHAW V. CROFT.** T. T. 1798. K. B. Cited Chit, on Bills. 227. 6th edit.
Assumpsit by the holder of a bill against the drawer. Defence, no regular notice of the dishonour; but it being proved that a message had been left at the drawer's house by the acceptor, stating that the bill had been dishonoured, Lord Kenyon, C. J. said, that it made no difference who apprised the drawer, since the object of the notice was that the drawer might have recourse to the acceptor.

14. **JAMESON AND OTHERS V. SWINTON.** M. T. 1809. 2 Campb. 373.
Assumpsit on a bill of exchange drawn by defendant, and by him indorsed to A. The bill became due on Saturday, and was in the hands of plaintiff's bankers, who gave plaintiffs notice of dishonour on Monday; and plaintiffs, the same evening, gave A. notice; between eight and nine the next evening, A. gave defendant notice. The question was, whether the notice of dishonour was sufficient to maintain the action. Lawrence, J. said, notice from any party to the bill is sufficient to render the drawer or indorser liable to all subsequent indorsees.—Verdict for plaintiff.

15. **ROSHER AND ANOTHER V. KIERAN.** M. T. 1814. N. P. 4 Campb. 87.
 Action by the indorsee against the drawer of a bill of exchange. It appeared, the bill was presented for payment the day it became due, and dishonoured; and the acceptor, the same day, informed the drawer of inability to pay the bill, which he stated to be in plaintiff's hands. The question was, whether this was due notice of dishonour. Lord Ellenborough held it sufficient.—Verdict for plaintiff.

16. **PORHOUSE V. PARKER.** M. T. 1807. K. B. N. P. 1 Campb. 82.
 Action by the payee against drawers of a bill.
 Per Lord Ellenborough, C. J. Where several are concerned together in partnership, notice to one partner is equivalent to notice to all of them, if the transaction in respect of which the notice is given *bona fide*.

* It has been holden, that in general, the notice of non acceptance or non payment should come from the holder, because notice is not required, merely that the parties from whom the holder received the bill may immediately call on those who are liable to them for an indemnity, but it must import that the holder intends to support his legal rights and resort to them for payment; and therefore, where the drawer, having notice before the bill was due, that the acceptor had failed, gave another person money to pay the bill, and the holder neglected to give notice of the dishonour, it was holden that the drawer was discharged; **Nicholson v. Gouthis**, 2 H. Bl. 612. abridged ante.

† It is usual for each party, immediately upon receipt of notice to give a fresh notice to such of those parties who are liable over to him, and against whom he must prove notice; **Bayley on Bills**, 142; **Kyd**, 126.

‡ And when a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonoured, it is we have seen ante, unnecessary to give notice of such dishonour to the firm, for this must necessarily be known to one of them, and the knowledge of one is the knowledge of all. If the party entitled to notice be a bankrupt, notice should be given to him and his assignees; see 2 Esp. 511; 1 B. & P. 652; 5 Esp. 175; if the party be dead, notice should be given to his executor or administrator. When the party entitle

(d) *What circumstances amount to waiver of a neglect to give notice.*

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HORFORD v. WILSON. M. T. 1807. C. P. 1 Taunt. 12.

To an action by an indorsee against the drawer of a bill of exchange, the defendant pleaded the general issue, and delivered notice of set-off. It appeared, that the bill having been dishonoured, the holder sent a letter by post to inform the drawer of the circumstance. Shortly afterwards the holder having met the defendant, the latter advised the former to return the bill to the plaintiff, who had indorsed it to him. The letter, giving notice of the dishonour, was not put in evidence; but a clerk to the plaintiff's attorney proved that having called on the defendant's attorney, after the action was commenced, to inquire into the particulars of the set-off, the latter told him that a sum of money had been paid on account of the bill, but did not make any observation as to the want of notice of the dishonour. The plaintiff had a verdict; and on a rule nisi for a new trial being obtained, on the ground that parol evidence of the notice had been admitted, though the letter might have been proved; the Court were of opinion that the defendant had, by the circumstances detailed, waived his right to dispute the regularity of notice.—Rule discharged. See 2 Doug. 467; 2 East. 469; 2 Stra. 1246.

Want of notice to the drawer of non-payment of a bill of exchange, may be waived by the drawer's making a payment on account of the bill;

2 HOPES v. ALDER. M. T. 1799. K. B. 6 East. 16.

Indorsee against drawer; defence, no notice of dishonour; proof that defendant afterwards said that he would see the bill paid, which the Court holding to be an equitable consideration, gave judgment for plaintiff.

Or by saying he would see it paid.*

3. LUNDIE v. ROBERTSON. H. T. 1806. K. B. 7 East. 231; S. C. 3 Smith.

Or by the indorser,

Rep. 225. S. P. WHITAKER v. MORRIS. Lent. Ass. 1756. Select Ca. 171. Indorsee against indorser of a bill. No evidence was given of presentment or notice; but it was proved, that being called upon by the plaintiff's clerk, some months after the bill was due, the defendant, "he had not the cash by him, but if the clerk would call in a day or two, and bring the account (meaning of the expenses) he would pay it." The bill was shown to him at the time. On a second application he offered a bill on London for the debt and expenses, which was refused. He then said, "that he had not had regular notice; but as the debt was justly due he would pay it." Chambre, J. thought this sufficient, and verdict for the plaintiff. On a rule nisi for a new trial, and cause shown. Lord Ellenborough said the case admits of no doubt. It was to be presumed *prima facie*, from the promise to pay, that the bill had been presented in time, and that due notice had been given; that no objection could be made to payment, and that every thing had been rightly done. This superadded the necessity of the ordinary proof. The other conversation does not vary the case; for though the defendant said he had not had notice, he waived

[481] upon being called upon for payment by a subsequent indorsee, saying it was a just debt, and he would pay it;

to notice is abroad, at the time of the dishonour, if he have a place of residence in England, it will be sufficient to leave notice of non-acceptance at that place; and a demand of payment from his wife, or servant would be regular; *ibid.* In Philips v. Astley, 2 Taunt. 206. it was held, that if the drawer of a bill of exchange goes abroad, leaving an agent in England with power to accept bills, who accepts a bill for him, the bill, when due, must be presented to the agent for payment if the drawee continues absent; and that, upon a guarantee given for the price of goods to be paid for by bill, due notice of the non-payment must be given both to the drawer and to the guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due; see post p. 485. It was once thought, that notice of non-acceptance must in all cases be given to the drawer of a bill, and demand made of him of payment, or that in default thereof the indorsers would be discharged, notwithstanding they had regular notice. This opinion, however, so far as it related to common bills, was overruled in the case of Bromley v. Frazier, 1 Stra. 411; and in its relation to inland bills, in the case of Heylin and others v. Adamson, 2 Burr. 660; see Com-579; 1 Stra. 411; on the principle, that to require a demand of the drawer, would be laying such a clog upon bills as would deter every person from taking them, since the drawer may perhaps live abroad; besides, the acceptor is primarily liable; and as the act of indorsing a bill is equivalent to making a new bill, the indorser thereby undertakes, as well as the drawer, that the drawee shall honour the bill, and the holder may consequently immediately resort to him, without calling on any of the other parties.

* Or a promise that he will set the matter to rights; Anson v. Bailey, Bull. N. P. 276; if the parties insisting on the want of notice were cognizant that the omission amounted to a waiver of their liability.

that objection. See 5 Burr. 2670; 1 T. R. 712.

4. ROGERS V. STEPHENS. M. T. 1788. K. B. 2. T. R. 713.

Or by ac-
knowledg-
ing that it
must be
paid.

In an action against the drawer of a foreign bill, an objection was taken that there was no protest but it appearing that the defendant had no effects in the hands of the drawees when the bill was drawn, or afterwards, and that on being pressed for payment by the plaintiff's agent, after the bill was dishonoured, he said the bill must be paid. Lord Kenyon, C. J. thought a protest or notice unnecessary, and directed the jury to find for the plaintiff, which they did. A rule being afterwards granted to show cause why there should not be a new trial, it was stated that the defendant had really been prejudiced by want of notice to the amount of the bill; that he had advanced money to one C. to the amount before the bill was drawn; that C. desired him to draw on the drawees as C.'s agents; that he did so, on a supposition that C. had effects in their hands; that he afterwards settled with C.; and upon a reliance that the bill was paid, delivered him up effects to more than the value of the bill, and that C. was since insolvent; that the defendant was prepared with evidence to this effect, but that Lord Kenyon, C. J. delivered it as his opinion, that it did not make a protest or notice necessary. Lord Kenyon, C. J. did not recollect that this evidence was offered, but he and all the Court thought it answered by the defendant's admission that the bill must be paid, because that was an admission that the plaintiff had a right to resort to him upon the bill, and that he had received no damage by the want of notice, and was a promise to pay.

5. CHATFIELD V. PAXTON. T. T. 1797. K. B. Cited Chit. on Bills, 236. 6th edit.

But it seems
a subse-
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ise under
a misappre-
hension of
legal liabi-
lity, is una-
vailable.*

The plaintiff gave a bill to defendants on Luard and Co. The defendants gave time to the acceptors, and they afterwards became insolvent, of both which circumstances the defendants gave the plaintiffs notice, and he, at their request in a letter, accepted another bill, which he afterwards paid; and this action was brought to recover back the money paid.

Per Lord Kenyon. My opinion is against the defendants. It is not only necessary that the plaintiff should know all the facts, but that he should know the legal consequence of them. It seems to me that the plaintiff did not know the legal consequence of them, and that he paid this money under an idea that he might be compelled to pay it. When the defendants granted the indulgence of two months to Luard and Co. they gave it at their own risk. Where a man, knowing all the facts explicitly, and being under no misapprehensions with regard to any of them, nor of the law acting upon them, chooses to pay a sum of money, *volenti non fit injuria*, he shall not recover it back again. But the letters of the plaintiff in this case prove directly the contrary, for they are written in a complaining style.—Verdict for the plaintiff 2000*l.*, and interest from the time of payment.

6. COOPER V. WALL. 1820. K. B. Cited Chit. on Bills, 236. 6th. edit

Though the
tenability of
that autho-
rity seems
questiona-
ble.

Action against drawer. No evidence of presentment to acceptor, or notice of non-payment to drawer. The bill was due on Saturday the 7th of August, 1819. On the 12th of August witness called with the bill on defendant, and informed him that, at the request of plaintiff, the holder, he called for payment. The defendant said he was sorry the acceptor had not paid the money; that he had promised to advance the money, but that he had deceived him, and that he (defendant) would see the acceptor upon the business, and they would call on the holder. Per Abbott, C. J. This is sufficient to waive laches of holder (though Marryatt considered that there ought to be an express waiver,) and said, that if the drawer deal with the bill after it has been dishonoured, that suffices to charge him.

* Though from the case of Bilbie v. Lumley, 2 East. 469. it appears that money paid by one knowing (or having the means of such knowledge in his power,) all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again on account of such payment having been made under an ignorance of the law, although the party paying expressly declared that he paid without prejudice; see 5 Taunt. 148; 1 B. & P. 326; 12 East. 88; 1 Esp. 279; 2 Esp. 546;

7. **STEVENS v LYNCH.** H. T. 1810. K. B. 12 East. 38; S. C. 2 Campb. 322.

The defence in this action, which was by the indorsee against the drawer of a bill, was, that the plaintiff had given time to the acceptor; in answer to which it was proved, that the defendant knew of such time having been given; but that, conceiving himself to be still liable, three months after the bill became due, he said to the plaintiff, "I know I am liable, and if the acceptor does not pay it, I will." Upon this Lord Ellenborough directed a verdict to be found for the plaintiff; and upon a motion for a new trial, the Court held the direction right, and refused a rule, observing, that the drawer was bound by his promise, and could not avail himself of his ignorance of the law at the time when he made the promise. See 1 T. R. 285; Chit. on Bills, 102; 2 East. 471; Chatfield v. Paxton. *ibid.* n.

8. **POTTER v. RAYWORTH;** E. T. 1811. K. B. 13 East. 417.

Indorsee of a note against the payee and indorser. It appeared that the note (which had been negotiated in the country) had been indorsed by the defendant to A. B. by him to the plaintiff, and by the plaintiff to C. D., and by him to others, before it became due. A fortnight after it became due, C. D., who had taken it up, called on the defendant, who, until then, had received no notice of its dishonour. The defendant then promised C. D. to pay him the next day, and having failed in this, C. D. resorted to the plaintiff, who paid the amount; and the defence now being the want of notice, the question was whether the plaintiff could avail himself of this promise so made to C. D. Graham, B. directed a verdict for the plaintiff; and on a motion to set it aside, the Court (Gross and Le Blanc, Js. absent) held, that this promise was an acknowledgement by the defendant, either of notice, or that without notice he was the proper person to pay the note, and refused the rule. See 7 East 231. out any objection being made for want of notice, is sufficient to enable a jury to presume that regular notice was given, though the promise was not made to the plaintiff, or in his presence, but to a subsequent indorsee, who then held the note.

9. **DENNIS v. MORRICE.** E. T. 1800. K. B. N. P. 3 Esp. 158.

Action on a bill of exchange; defence, that the defendant had received no notice of the acceptors non-payment; to supersede the want of notice it was proved that the defendant, who was a foreigner, said, "I am not acquainted with your laws; If I am bound to pay it, I will." Lord Kenyon, C. J. holding a notice indispensable, and the subsequent promise unavailable, nonsuited the plaintiff.

10. **ROUSE v. REDWOOD.** E. T. 1794. K. B. N. P. 1 Esp. 155.

Action on a note, on which the defendant had been discharged by want of notice; to prove a waiver of the omission, a sheriff's officer was called to state a subsequent promise which had been made by the defendant on his being arrested, saying, *it was true the note had his name on it, but that he had security, though he waited for a time to pay it.* But Lord Kenyon, C. J. said, an admission made by a person under an arrest, and ignorant of his rights, cannot be admitted in evidence to render him liable.

11. **GOODALL v. DOLLEY.** E. T. 1787. K. B. 1 T. R. 712.

Indorsee against indorser; the bill drawn in favour of the defendant, payable the 11th of January, 1787, was presented for acceptance by the plaintiff the 8th November, 1786 when acceptance was refused; he gave no notice to the defendant till the 5th January, and then did not say when the bill was presented; upon which the defendant proposed paying it by instalments; but the plaintiff rejected the offer and brought this action; at the trial, Heath, J. thought the defendant discharged for want of notice, and that his offer to pay being made under ignorant circumstances, was not binding; and the jury

* And such a promise will dispense with the necessity of a protest of a foreign bill; *Gibson v. Coggan*, 2 Campb. 188. abridged post.

† But a promise to pay, made without a knowledge of the fact of non-acceptance, or of the laches of the holder, will not be binding; *Blessard v. Hirst*, 5 Burr. 2672, abridged *ante*; see 1 T. R. 712; 1 B. & P. 326; 2 Campb. 333; 12 East. 39. And it seems that money paid under such circumstances might be recovered back; see 3 Moore 635; S. C. 1 Gow. 128; 1 B. & P. 326; 2 East. 469; 2 Blac. 824.

For it has been since holden, that the drawer's liability on a bill of exchange, the acceptor of which had [483] been indulged by the holder, is revived by a promise to pay,* though the promise was made under a mis conception of the law. So a promise to pay a promissory note after it has become due, with

But such an omission is not waived by a foreigner saying *I am not acquainted with your laws; if I am bound to pay it, I will;*

Or by the party entitled to notice promising to pay it under an arrest.

[484] So if the indorser be discharged by want of notice, but of which circumstance he is ignorant, and propose terms for liquidating the bill, which are rejected, he may never

theless resort to his original rights. So if the drawer on being arrested, merely of *fero to compromise the action*, it is not a waiver of want of notice.

Although an indorser of a bill, without knowledge of certain laches of the holder, by which he was discharged, pay it, he [485]

cannot sue a prior indorser who availed himself of such laches as a defence. Where a person guarantees the payment of a bill, if it be dishonoured, notice of that fact must be given to the guarantor.

But where a party guarantees the payment of a bill, and before it becomes due is informed of the insolvency of the acceptor it has been held not necessary, upon its being dishonoured, to give him notice of such fact.

under his direction found a verdict for the defendant. Upon cause shown against the rule for a new trial, the Court thought the verdict and direction right, and discharged the rule.

12. CUMING v. FRENCH. H. T. 1809. K. B. N. P. Cited 2 Camp. 107.

Action against the defendant as drawer of a bill of exchange; it appeared that the defendant on being arrested, without acknowledging his liability, merely offered to give a bill by way of compromise. On the question, whether this obviated the necessity of proving notice; Lord Ellenborough, C. J. said, the offer was not a waiver of the necessity of expressly proving the notice of dishonour, though it would have been sufficient if the plaintiff had acceded to his offer.

13. ROSCOW v. HARDY. T. T. 1810. K. B. 12 East. 434.

Acceptance of a bill refused; of this, however, the holder gave no notice; but when the bill became due, again presented it for payment, and that being refused, he called upon the plaintiff, an indorser, for payment; and he being ignorant of the laches, paid it. He now sued the defendant as his indorser, who set up the laches of the holder, as his defence, and the plaintiff was nonsuited. On motion to set aside the nonsuit, it was argued, that the plaintiff ought not to be prejudiced by the laches of subsequent holders, of which he was ignorant, without the means of information. But the Court held, that his ignorance, which had prevented him availing himself of this laches, as a defence, could not alter or revive the liability of the defendant, who had been discharged by the same laches.—Rule refused.

(C) AS CONCERNS THE RIGHT OF A GUARANTOR. As to his general liability, see *lit. Guarantor.*

1. PHILIPS v. ASTLING. M. T. 1809. C. P. 2 Taunt. 206.

The declaration, in an action of *assumpsit*, alleged, that in consideration the plaintiff would sell and deliver to A. B. certain goods to be paid for by a bill to be drawn by A. B. upon C. D. the defendant undertook to guarantee the payment of such bill. It then averred the delivery of the goods, the presentment for payment, and dishonour. At the trial it appeared that no notice of dishonour had been given to the defendant, and that the drawer and acceptor had become bankrupts, but not till several months after the bill was dishonoured; however, the plaintiff had a verdict. Put on motion for a new trial, the Court said, that here the bankruptcy of the drawer and acceptor did not happen until long after the bill had become due; and that for any thing that appeared, if the money had been demanded either of the drawer or acceptor, the bill might have been paid, but that the necessary steps not having been taken to obtain payment from the parties who were liable upon the bill, and solvent, and the guarantor not having received notice, he must be discharged.—Rule absolute.

2. HOLBROW v. WILKINS. M. T. 1822. K. B. 1 B. & C. 10; S. C. 2 D. & R. 59.

A. a broker, effected a sale of 20 bags of wool for B. and C. to E. and F. to be paid for by a bill at eight months. accepted by the latter; and in his notice of sale said to the former, "To show my opinion of this house, for an allowance of one per cent. I will guarantee half the amount." B. and C. confirmed the sale, and informed A. that if he could procure from E. and F. acceptances of approved houses, (which they would prefer), they would take his guarantee on the terms proposed. The wool was delivered to the vendees without the intervention of the broker, and the vendors took the acceptance of the former for the amount of the wool, made payable at a banker's. Before the bill was at maturity, the vendees became insolvent, of which the broker was informed, and the vendors resorted to the broker on his guarantee. A verdict was found for the plaintiffs. The bill was never presented, nor was any notice of non-payment given to defendant. A motion was now made to enter a nonsuit, and it was contended that the case of *Phillips v. Astling* (2

* Though the drawer of a bill may by circumstances impliedly waive his right of defence founded on the laches of the holder, yet an indorser can only do so by an express waiver; *Borradale v. Lowe*. 4 Taunt. 93. abridged ante.

Taunt. 206.) showed that where a guarantee is given for the price of goods which are to be paid for by bill, due notice of dishonour must be given to the surety. *See per Cur.* The case cited is distinguishable. The insolvency in that case did not happen until after the bill became due. Besides the defendant is not a party to the bill, and therefore the case of *Swinyard v. Bowes*, (5 M. & S. 62.) decides the point.—Rule refused. See 5 B. & A. 165.

2. PROTEST AND NOTING ON DISHONOUR.

1. *GOOSTREY v. MEAD*. 1751. Bull. N. P. 271. S. P. *ROGERS v. STEPHENS*. [486]
M. T. 1788. K. B. 2 T. R. 713. S. P. *LOUVIERE v. LAUBRAY*. T. T. 1713.
K. B. 10 Mod. 37. S. P. *ANON*. T. T. 1697. K. B. Comb. 451. S. P.
GALE v. WALSH. 5 T. R. 239.

Or the non-acceptance or non-payment of a foreign bill, there must be a *protest*,* which should accompany the notice.

A drew a bill of exchange in the West Indies on T. in London, at 60 days sight, in favour of W. or order. W. indorsed it to G. who presented the bill to T. who refusing, G. noted it for non-acceptance, and at the end of 60 days protested it for non-payment, and then wrote a letter to A. and also to his agent in the West Indies, acquainting them that the bill was not accepted. In an action brought by G. against A. he was nonsuited; for by not sending the protest for non-acceptance, he made himself liable. The use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated the day the noting was made.

By 3 & 4 Anne. c. 9. s. 4. "Whereas by an act of parliament made in the ninth year of the reign of his late majesty, king William the Third, intituled, 'An Act for the better payment of Inland Bills of Exchange,' it is among other things enacted, that from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting) and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the same bill or bills to be protested in manner as in the said act is enacted; and whereas, by there being no provision made therein for protesting such bill or bills, in case the party, on whom the same are or shall be drawn refuse to accept the same by underwriting the same under his hand, all merchants and others do refuse to underwrite such bill or bills, or make any other than a promissory acceptance, by which means the effect and good intent of the said act in that behalf is wholly evaded, and no bill or bills can be protested before, or for want of such acceptance by underwriting the same as aforesaid:" for remedy whereof, be it enacted by the authority aforesaid, that from and after the 1st day of May, 1705, in case, upon presenting of any such bill or bills of exchange, the party or parties, on whom the same shall be drawn, shall refuse to accept the same, by underwriting the same as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange; any thing in the said act or any other law to the contrary notwithstanding; for which protest there shall be paid 2s. and no more."

And there may be a protest on the non-acceptance of an inland bill;

By 9 & 10 W. 3. c. 17. "Whereas great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange in this kingdom;" be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that from and after the 24th day of June next, 1698, all and every bill or bills of exchange drawn in, or dated at and from, any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, of the sum of 5l. sterling or upwards, upon any person or

If such bill is for the payment of 5l. or upwards, with in a limited time after date, and the value is expressed therein to have been received, or after an ac

* For whenever notice of the non-acceptance of a foreign bill is necessary, a protest must also be made, which, though mere matter of form, is, by the custom of merchants indispensably necessary; see 2 T. R. 713; 7 East. 450; 2 Ld. Raym. 993; 1 Salk. 181.

ceptance written on such a bill for its non payment.

persons of or in London, or any other trading city, town, or any other place (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received), and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof, and from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting), and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment of the same; which protest shall be made and written under a fair written copy of the said bill of exchange, in the words or form following. "Know all men, that I, A. B. on the _____ day of _____ at the usual place of abode of the said _____ have demanded payment of the bill, of which the above is a copy which the said _____ did not pay, wherefore I the said _____ do hereby protest the said bill. Dated this _____ day of _____."

But if a man draw a bill on this country abroad, and after wards comes here, notice of its dishonour is sufficient, though the fact of its having been protested is not like wise communicated.

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So if the drawer of a foreign bill of exchange has no effects, nor any ground to expect a penny in the hands of the drawee, and when he has no other valid foundation to expect payment by the drawee, a protest is unnecessary to charge him.

2. *ROBINS V. GIPSON*. E. T. 1813. K. B. 1 M. & S. 288; S. C. 3 Campb, 334. S. P. *CROMWELL V. HYNSON*. M. T. 1796. N. P. 2 Esp. 511.

Indorsee of bill drawn at Buenos Ayres against drawer. Previously to the bill becoming due, defendant returned to this country. The bill was dishonoured, and notice thereof left at his house, but no notice given of its being protested. Lord Ellenborough held that notice sufficient; and on motion for a new trial, the Court agreed with him. Lord Ellenborough said, it did not appear that the defendant requested to have the protest; he had notice of the bill's dishonour, and, as circumstances alter, the rule respecting notice changes; if the party is abroad, he cannot know of the protest, except by having it; but if he be at home, that fact may be with facility ascertained by him.—Rule refused. See 2 Ld. Rd. 993; 2 Esp. 511.

3. *LEGGE V. THORPE*. H. T. 1810. K. B. 12 East. 171.

This was an action by an indorser against the drawer of a foreign bill, drawn upon A. B. payable one month after sight, of which acceptance had been refused. The declaration negatived effects in the hands of the drawee, or any consideration for the bill. It appeared, at the trial, that the defendant had no effects in A. B.'s hands, and that the latter had therefore refused acceptance, but that A. B. was one of the executors of one C. D., and that C. D.'s executors had desired the defendant to employ the payee of this bill to do some carpenter's work on C. D.'s property, and the defendant therefore drew this bill on A. B. to settle with the payee. A. B. denied that he had assets to pay the bill. The only question was, whether a protest for non-acceptance were necessary. The judge thought not, and a verdict was given for the plaintiff, but the point was reserved: and on a rule nisi for a nonsuit, the whole Court were of the same opinion, observing: we do not mean to say that actual value in the hands of the drawer at the time of drawing is essentially necessary to entitle the drawee to notice in case of the dishonour, for circumstances may exist which would give a drawer good ground to consider that he had a right to draw a bill upon his correspondent, as where he had consigned effects to him to answer the bill, though they may not have come to hand at the time when the bill was presented for acceptance. But the defendant does not appear to have stood in any such situation as would entitle him to draw this bill, for he had no effects at the time in the drawee's hands, nor had any means to furnish him with any; and therefore the question dryly is, whether, without effects in hands, or that which might be deemed an equivalent, a protest was necessary in this case, being that of a foreign bill. Now, the Court, in *Bickerdike v. Bollman* (1 T. R. 410), considering the difficulty of giving notice of dishonour in all cases as a reason against the universality of the rule, looked to the reason for which notice was required to be given, and therefore laid down the rule not generally, that where the drawer had no effects in

the hands of the drawee at the time, no notice of the dishonour should be given; but that it need not be given where the drawer must have known at the time that he had no effects to answer his bill. That has been acted upon ever since in the case of inland bills; and in *Rogers v. Stephens* (2 T. R. 713) the same rule was held to extend to foreign bills; and the subsequent cases of *Gale v. Walsh* (5 T. R. 239) and *Orr v. Maginius* (7 East. 359) were in effect confirmatory of the decision in *Rogers v. Stephens*, for the effect in both was to take the case out of the general rule, by showing the fact that the drawer had no effects in the hands of the drawee. See 2 Campb. 311; 2 Lo. Rd. 993; 1 B. & B. 654.

4. *LEFTLEY v. MILLS.* H. T. 1791. K. B. 4 T. R. 170.

An inland bill, payable at so many days after sight, became due, allowing the days of grace, on the 24th April. It was presented for payment in the morning, and the acceptor not being at home he left word where it lay. After six o'clock it was noted, and between seven and eight it was presented again, when the acceptor tendered the amount of the bill, and 6d. over, but he (the person who presented it) insisted on 2s. 6d. for the noting; and that sum not being paid, the indorsee brought this action against the acceptor. At the trial, Lord Kenyon, C. J. thought the tender of the amount of the bill, at any time of the day it was payable, was sufficient; upon which the jury found a verdict for defendant. On a rule to show cause why there should not be a new trial, Lord Kenyon, C. J. was of opinion, that the acceptor had until the last minute of the day of grace to pay the bill, and that it could not be noted or protested till the following day. But Buller differed, being of opinion that they were payable at any time of the last day of grace upon demand, so as such demand was made within reasonable hours, and that they might be protested on that day. Grose, J. declined giving any opinion upon that point; but the Court concurred that the bill in question could not be noted, because it was payable within a limited time after sight; and the statute 9 & 10 W. 3. c. 17. s. 1. authorises the noting of such inland bills only as are payable *after date*. It was observed by Lord Kenyon, C. J. that the sixpence charged for the noting was sufficient.—Rule discharged.

By 3 and 4 Anne, c. 9. s. 6. it is provided that no such protest shall be necessary, either for non-acceptance, or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed in such bill to be received; and unless such bill be drawn for the payment of 20*l.* sterling or upwards, and that the protest hereby required for non-acceptance, shall be made by such persons as are appointed by the 9 & 10 W. 3. c. 17. to protest inland bills of exchange for non-payment thereof.

5. *BROUGH v. PARKINS.* M. T. 1712. K. B. 3 Salk. 69; S. C. 2 Ld. Raym. 992; S. C. 6 Mod. 80. *S. P. KING v. HART.* M. T. 1698. K. B. 12 Mod. 360.

On a writ of error brought on a judgment by default in C. B., in action, brought against the drawer of an inland bill of exchange; it was objected in arrest of judgment, that since stat 9 W. 3. no damages should be recovered against the drawer on a bill of exchange, without a protest, and therefore the action could not lie, there being none. *Per Holt. C. J.* The statute never meant to destroy the action for want of a protest, but only to deprive the party from recovering interest and costs, on an inland bill against the drawer, without notice of non-payment by protest; for that before the statute, there was this difference between foreign and inland bills of exchange; if the bill was foreign, one could not resort to the drawer for non acceptance or non-payment, without a protest, and reasonable notice thereof; but in case of an inland bill there was no occasion for a protest; but if any prejudice happened to the drawer, for want of notice of non-payment, which the person to whom the bill is made ought to give, the drawer was not liable; and the word damage, in the statute, was meant only of the damages the party is at in being longer out of his money than the tenor of the bill purported, and not of damages of the original debt; and the protest was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a protest, that shall be borne by him

And on inland bills payable after sight, a [489] protest can not be properly made as the 9 & 10 W. 3. authorising a protest upon inland bills, only applies to bills after date.

And by statute, it is never necessary, where the bill is for the payment of less than 20*l.*

But in practice, inland bills are seldom protested.

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to whom the bill is made; and if no damages accrue to him, then there is no harm done him, and a protest is only made to give formal notice that the bill is not accepted, or accepted and not paid; and if in such cases the damage amounts to the value of the bill, there shall be no recovery, but otherwise he ought not to lose his debt; but that ought to appear either in evidence on *non-assumpsit*, or by special pleading; and the act is very obscurely and doubtfully penned, and we ought not, by construction on such an act, to take away a man's right. Judgment affirmed.

6. *WINDLE v. ANDREWS*. T. T. 1819. K. B. 2 B. & A. 696; S. C. 2 Stark.

425. *S. P. HARRIS v. BENSON*. T. T. 1732. K. B. 2 Stra. 910.

And interest
restoring be
recovered
on an in-
land bill,
without a
protest.

Indorser against drawer of a bill. Verdict for plaintiff for the principal and interest; to set aside which, as far as related to the interest, a rule nisi had been obtained, which now came before the Court; when it was contended that by the 3 & 4 Anne, c. 9. s. 4. the drawer of an inland bill was not liable for interest, unless the bill had been protested. But the Court held the want of a protest no ground for disallowing interest where notice of the dishonour of the bill had been duly given; that the object of 9 & 10 W. 3. and 3 & 4 Anne. c. 9. s. 4. was to give interest, damages, and costs, in cases in which it is supposed they were not recoverable at common law, not to deprive a plaintiff of them, in any case in which the common law would give them; that the 5th section, which contained the words of deprivation, was by way of proviso only, to qualify the additional benefit that statute and the statute of William were supposed for the first time to give; that the proviso in the 8th section contained words to secure to a plaintiff all his common rights, and that the right to damages, was a common law right; that it was upon this principle only that the constant allowance of interest where there was no protest could be explained; and in *Rex v. Meggot*, 7 Geo. 2. (Str. 1000) Eyre, C. J. of K. B. held that they had that effect; that this notion was corrected in *Lumley v. Palmer*, (Str. 1000.) upon the principle now adopted by the court, that the 5th section of the 3 & 4 Anne, c. 9. deprived a party of no remedy he had at common law; that that case must be considered as having virtually overruled *Harris v. Benson* (2 Str. 910.) and that from that time for any thing which appeared to be the contrary, parol acceptances had been held binding, and interest had been allowed against the drawers and indorsers of all inland bills, though no instance could be shown in which any such bill had been protested.

Though the
stat. con-
tains words
which pre-
[491]
sunt facie
show that
no special
damage or
interest
could be re-
covered,
unless there
was a pro-
test.*

The protest
of a foreign
bill should
be made
the day it
is present-
ed.†

By 3 & 4 Anne, c. 9. s. 5. it is provided that no acceptance of such bill shall be sufficient to charge any person, unless the same bill shall be underwritten or indorsed in writing thereupon; and if such bill be not so accepted, the drawer shall not be liable to pay any costs, damages or interest, unless such protest be made for non-acceptance thereof, and, within fourteen days after such protest, the same be sent, or otherwise notice thereof be given to the party from whom such bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due, the drawer shall not be liable to pay any costs, damages, or interest, unless a protest be made and sent, or notice thereof given, in manner and form above mentioned; nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest, upon such inland bill, if any one protest be made of non-acceptance, or non-payment thereof, and notice thereof be sent, given or left aforesaid.

7. *LEFTLEY v. MILLS*. H. T. 1791. K. B. 4 T. R. 170.

Per Buller, J. With regard to foreign bills of exchange, all the books agree that the protest must be made out the last day of grace.

8. *CHATERS v. BELL*. T. T. 1801. K. B. 4 Esp. 48.

In an action against the indorser of a foreign bill, it appeared that the bill

* A protest may be made on the non payment of coal notes given pursuant to 3 Geo. 2. c. 26. s. 7.

† A protest for non acceptance of an Inland bill may be made in like manner as for non-acceptance of a foreign bill. see 3 & 4 Anne, c. 9. s. 4; but a protest for non-payment of an inland bill cannot be made until the day after such bill has become due; see 9 & 10 W. 3. c. 17. s. 1.

But it may
be drawn
up at any
time.

became due on the 24th of April when payment was demanded, and refused, and the bill was noted for non-payment. Regular notice of the dishonour was given to the defendant; but he refused payment, because there was no protest. On the 14th of May the protest was formally drawn up, and this action was afterwards brought. Lord Kenyon said, "he was of opinion, that if the bill was noted at the time, the protest might be made at a future period." A verdict was found for the plaintiff, but the point was reversed; and on the case coming on to be tried, on a *venire de novo*, before Lord Ellenborough, his lordship expressed his concurrence with the opinion of Lord Kenyon.

3d. ACTS WHEREBY THE PARTIES TO A BILL OR NOTE MAY BE DISCHARGED.

(a) *By absolute payment.*

1. BECK v. ROBLEY. T. T. 1773. C. P. 1 H. Bl. 89. n.

One B. drew a bill on defendant, which he accepted, payable to H., or order. Defendant did not pay when it was presented, upon which B. took it up, and indorsed it to the plaintiff, who brought an action upon it against the defendant; the jury being of opinion, that when B. took up the bill, its negotiability ceased, gave a verdict for the defendant. And on motion for a new trial, the Court thought the verdict right, and refused the rule.

2. CHEAP v. HARTLEY ET AL. Cited ALLEN v. DUNDAS. H. T. 1798. K. B. 3 T. R. 127.

The defendants, who had a house both in America and London, drew two bills in America of the same tenor and date on their house in London, in favour of the plaintiffs, one of them being lost, came to the hands of a third person, who forged the payee's indorsement, and received the amount of it from the defendants. Afterwards the real payees sued them on the other bill, and the payment of the forged one was held to be no discharge, and the plaintiffs recovered the amount of it.

3. DENT v. DUNN, EXECUTRIX. M. T. 1812. N. P. 3 Campb. 296.

In this case, which was an action of a promissory note, it appeared defendant gave her agent a sum of money to take up a bill drawn by her testator; the agent attended for such purpose; but plaintiff had mislaid it, and before it was found the agent failed with the money in his hands. The question was, whether, under the circumstances, the plaintiff had made the holder of the money his agent. Lord Ellenborough said, the holder could not be considered the plaintiff's agent, because the money was not to be paid until the notes were produced. The tender could not possibly extinguish the debt.—Verdict for plaintiff.

4. SEBAG v. ABITBOL. H. T. 1816. K. B. 4 M. & S. 462.

A bill was accepted payable at a banker's counting-house. The bill, when due, was not presented for payment; whereupon the acceptor wrote to the holder (the drawer) requesting that the bill might be returned to him, who, in answer, acquainted him that the bill could not be found. Afterwards, and after a lapse of time sufficient to have enabled the acceptor to have withdrawn the funds, which he had placed with the banker to answer the bill, the banker failed with the said funds in his hands. The bill was afterwards discovered; and the defendant, the holder of it, attempted to set it off in an action brought by the acceptor; as to his right to do which, a case had been reserved at the trial for the opinion of this Court. It was now argued, that the plaintiff was discharged from his acceptance on two grounds; 1st, because the bill having been accepted payable at a particular place, presentment ought to have been made at that place; 2d, because, granting that that was not necessary, yet that the bill being in the nature of a draft upon the banker, according to *Bishop v. Chitty* (2 Stra. 1195.) when a reasonable time for receiving it is elapsed, it is always considered as actual payment, otherwise the party might be obliged to keep funds there for ever. *Per Cur.* This case may be settled without any discussion, either as to the propriety or impropriety of the decisions of *Fenton v. Gourdry* (13 East. 459.) and *Gammon v. Schmoll* (5 Taunt. 344.) and the other cases in the Court of Common Pleas, where a difference of opinion between the two Courts is supposed to have obtained as to the validity of the

If the bill be once paid by the drawer, no action can be maintained by any indorsee against the acceptor.

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But pay ment under a forged bill is no satisfaction;

So where a note was mislaid, and an agent of one of the parties tendered payment, on consideration that it was delivered up, it was holden to be no satisfaction of the demand.

So where an acceptor of a bill, previously to its being presented at a banker's, where it was made payable, requested to have it returned, when he was informed it was lost, it was decided that some months afterwards, upon its be

ing found, first objection which has been urged on the part of the plaintiff, and without coming to a conclusion as to whether the bill in question should be viewed as a draft upon the banker, although it may be observed that this acceptance, though it might be an authority to the banker to pay the bill, being made payable at his house, is not in express terms an order upon him to pay, as was the case in *Bishop v. Chitty*, where the language of the acceptance was immediately that of a check upon the bankers, inasmuch as the defendant cannot be charged with *laches* on either ground. The plaintiff is informed that the bill is not to be found, after which there surely was not any occasion for him to keep a fund at the house where it was made payable. How can it be said that the plaintiff, after notice that his bill no longer existed, was bound to keep money at his bankers to answer the bill *in perpetuum*? It seems to us, that after such a notice, he was at liberty to withdraw his funds; and therefore whatever loss may happen to him by keeping them there must be his loss, and not the loss of the defendant. See 3 Taunt. 397.

(b) *By partial payment.*

1. *KELLOCK v. ROBINSON*. H. T. 1727. K. B. 2 Stra. 745.

Formerly a partial payment by drawer discharged the indorser. In an action by the indorsee of a promissory note against the indorser, it appeared that the plaintiff had, after the indorsement, received part of the drawer of the note; and it was held to be a taking upon himself to give the whole credit to the drawer of the note, and absolutely discharged the indorser. So the plaintiff was nonsuited.

2. *GOULD v. ROBSON*. T. T. 1807 K. B. 8 East. 576.

But it is now settled that the holder of a bill may take from the acceptor a part in payment and sue the other parties for the residue. The holder of a bill, on its becoming due, received part payment of the acceptor, and took a bill from him at a future short date for the remainder, and agreed to keep the original bill in his hands, in the interim, as a security. He now sued the defendant as indorser, and this was relied upon as a defence. Lord Ellenborough thought, at the trial, that it did not amount to giving time to the acceptor, and the plaintiffs had a verdict; but, upon a motion for a new trial, he and the Court were satisfied that it did, and a nonsuit was entered. Lord Ellenborough, C. J. said, how can a man be said not to be injured if his means of suing be abridged by the act of another? If the plaintiff, as holder of this bill, had called immediately upon the defendant for payment, as soon as the bill was dishonoured, he might immediately have sued the acceptor, and the other parties on the bill. I had some doubts at the trial, but am inclined to think, now, that time was given. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill. But here the holder did something more; he took a new bill from the acceptor, and was to keep the original bill till the other was paid. This is an agreement, that in the mean time the original bill should not be enforced. Such is at least the effect of the agreement; and, therefore, I think time was given.

See 2 Ves. jun. 540; 1 T. R. 167; 1 B. & P. 652-5; 2 id. 61; 3 id. 363.

3. *AYREY v. DAVENPORT*. T. T. 1807. C. P. 2 N. R. 474.

[494] And if the holder of a joint and several note enter up judgment by *cogno vit* against one of the makers, & levy under a *feri facias* for part, that is no discharge of the other. Action on a joint and several note made by the defendant and A. B. Defence, that the plaintiff, under a warrant of attorney given by A. B., had entered up judgment against him, and levied a part under a *feri facias*. But the Court said, this action may be maintained. The plaintiff has a right to sue every one of the makers of this note to judgment; though it is true that he cannot have satisfaction more than once. If an action be brought against A. B., and he suffer judgment by default, how can that discharge an action against the defendant?

4. *LAXTON v. PEAT*. T. T. 1809. K. B. N. P. 2 Campb. 185.

Indorsee of a bill against the acceptor. It appeared that the bill had been accepted for the accommodation of the drawer, which circumstance was known to the plaintiff, who gave value for the bill. When the bill became due, the plaintiff received part payment from the drawer, and gave him time to pay the remainder, without the concurrence of the defendant. Per Lord Ellenborough, C. J. This being an accommodation within the knowledge of all the parties, the acceptor can only be considered as surety for the drawer; and in

the case of simple contracts, the surety is discharged by time being given without the concurrence to the principal. accepted, without considera
 tion, receive part from the drawer, and give him time for the payment of the residue, he discharges the acceptor.

5. KERRISON v. COOKE. H. T. 1813. C. P. N. P. 8 Campb. 362.

Indorsee against acceptor. The plaintiff, after notice that the bill was accepted for the accommodation of the drawer, gave time to the drawee without concurrence of the defendant; and yet Gibbs, C. J. held that the plaintiff was entitled to recover; observing, that assuming Laxton v. Peat to be law, (the ed. tenability of which has been impugned.) the present case was distinguishable. Though the preceding case has been doubt ed.

(c) By release.

1. CARSTAIRS v. ROLLESTON. E. T. 1814. C. P. 5 Taunt. 551.

Action by assignee of first indorsee of a promissory note, against the maker. Plea, that the defendant made the note as surety for the payee, and not on his own account; and that plaintiff had released the payee from the note, and from all claims and sums due thereon. There was no allegation that plaintiff knew that defendant was only surety; and, on demurrer, the Court held the plea bad, and gave judgment for plaintiff. The maker of a note is discharged by a release to the pay.

2. DE LA TORRE v. BARCLAY AND SALKELD. M. T. 1814. N. P. K. B. 1 [495] Stark. 7.

The drawees of a bill having become bankrupts, an agreement was entered into between their assignees, the holder, the plaintiff, and the acceptor, by which the acceptor agreed to pay the amount of the bill to the holder, on condition that he should not be called upon to pay more. In an action against the drawers, Lord Ellenborough, C. J. held, the agreement was a waiver of the liability of the acceptor, and was a waiver of the right of action against the defendants, who were represented by their assignees. —Plaintiff nonsuited, But an agreement between holder, drawer, and acceptor, that the acceptor shall pay it, discharges the drawer.

(d) By giving time.

1. ENGLISH v. DARLEY. H. T. 1800. C. P. 2 B. & P. 61; S. C. 3 Esp. 49.

In an action by an indorsee against the indorser of a bill of exchange, it appeared that the bill being dishonoured, the plaintiff, as indorsee, had obtained judgement in an action against the acceptor, and having taken out execution thereon, agreed, at the acceptor's instance, notwithstanding the latter had effects adequate to the levy, to accept part in money, and receive his bond and warrant of attorney for the remainder, with interest and costs, excepting a small sum left due, so as to obviate a preclusion of the indorsee's right of action against the other parties. The Court being of opinion that the plaintiff had waived his right of action against the defendant, directed a nonsuit. And on a motion for a new trial, Eldon, C. J. was of opinion, that the direction at Nisi Prius was correct, inasmuch as the plaintiff had, by taking part of the amount of the bill and the warrant of attorney, accepted such satisfaction as would discharge all subsequent parties. The rule that the holder of a bill of exchange, by giving time to the acceptor, discharges the other parties

See Cooke. B. L. 168. 172. ed. 4; 1 B. & P. 652; 2 Bl. 1235; 4 T. R. 825.

2. POLE v. FORD. M. T. 1816. K. B. 2 Chit. Rep. 125.

The plaintiff had brought an action against the drawer and acceptor of a bill, obtained judgment in each, taken the acceptor's goods in execution, abandoned such execution, and given time to acceptor. Under these circumstances, it was submitted that the drawer was discharged. But the Court held that withdrawing the *feri facias* against the acceptor did not discharge the drawer, and that the rule that giving indulgence to an acceptor, without the consent of the drawer, discharges such drawer, did not apply after judgment. Does not apply after judgment.

3. MARGESSON v. GOBLE. M. T. 1816. K. B. 2 Chit. Rep. 364

A promissory note, held by plaintiff, was dishonoured. This action, in which a verdict had been given for the plaintiff, and which it was now moved to set aside, was brought against his indorser, who relied, as a defence, upon the following letter, written to him by the plaintiff when the bill was dishonoured, operating as giving time to the maker, and therefore as discharging the defendant—"Mr. Ellis (meaning the maker) is unable to pay the note for a few days. He says he shall be ready in a week, which will be in time for Nor to a voluntary agreement by the holder of a note to wait for payment without [496]"

any consideration, if notice of the dishonour be communicated;

us—only form to acquaint you.” The Court refused a rule, and said, how did plaintiff give time? He did not give up his right to sue. How can it be said that a voluntary agreement to wait, without a consideration, could prevent him from suing?—Rule refused.

4. CLARKE AND OTHERS, EXECUTORS, v. DELVIN. E. T. 1803, C. P. 3 B. & P. 363.

Nor to a case where the party consents to the giving time; thus where the drawer of a bill of exchange, after notice of its dishonour, being told by the holder that he should take a warrant of attorney from the acceptor, said, “You may do as you please, I am discharged for want of notice;” the Court held these words an assent to the holder’s act.

So the mere circumstance of the holder of a bill of exchange taking and [497] then bill, not due, from the acceptor, without actually agreeing to give him time, is not a giving of time so as to discharge the other parties to the first bill.

It appeared in this case, that the defendant had drawn a bill of exchange, payable to his own order, on A., who accepted it, and directed its payment at the house of the defendant, who indorsed it to B., the plaintiff’s testator, who indorsed it to C. The bill being dishonoured, C. gave the defendant due notice, and was told, that if he would sue out a writ against A., he (the defendant) would procure his arrest. A. having offered, in order to obtain his discharge, to give to C. his warrant of attorney, and the latter having acquainted the defendant with the circumstance, and informed him that he should accede to the proposal, he said, “You may do as you like, for I have had no notice of the non-payment.” C. reminded him of his offer to arrest A., and accepted the warrant of attorney. The point of contention being, whether the indorsement of the bill to B. by the defendant should be considered a payment by the latter to the former, it was urged for the defendant, that C. had, by the fact of taking the security from A., discharged both the defendant and B., and thereby established a good payment by the defendant to the latter. The jury having found for the plaintiff, open to the opinion of the Court, a rule nisi for that purpose being obtained, the plaintiff’s counsel contended, that though the fact of a holder of a bill taking security from an acceptor, unattended by circumstances, was an absolute discharge of all parties; yet that when such time or credit was given with the knowledge or assent of the responsible parties, either express or implied, the effect of the holder’s act failed in favour of the party so concurring; and he urged, that the conversation that took place between the defendant and C. was demonstrative of a sufficient assent to remove the operation, the unsanctioned act of C. The Court fully concurred in the argument for the plaintiffs, and the rule was discharged.

See 2 B. & P. 61; 1 ibid. 652; 1 T. R. 167.

5. PRING v. CLARKSON. M. T. 1822. K. B. 1 B. & C. 14; S. C. 2 D. & R. 78.

Declaration in *assumpsit* on a bill of exchange by the indorsee against the drawer. Plea, *non assumpsit*. At the trial it appeared that the bill was drawn by the defendant for 85*l.* 8*s.* 7*d.*, in favour of Messrs. Gidden and Son, and directed to J. Thompson, who accepted it. The bill when due was held by the bankers at Abingdon, by whom it was presented for payment, when it was dishonoured, of which circumstance notice was immediately given to the drawer. Thompson sent by letter, another bill for 126*l.* to Gidden & Son, but had no communication with them respecting the first bill. Gidden and Son gave it to the bankers, who discounted it by sending them back the former bill and the difference in cash. The first bill was afterwards indorsed by Gidden and Son to the plaintiff. It was urged, at the trial, that Gidden and Son, by receiving a new bill, not due, had given time to the acceptor, and consequently that the defendant, being the drawer, was discharged. The jury found a verdict for the plaintiff, with liberty to the defendant to move for a nonsuit. Cause was shown against the rule for a new trial, and it was contended that the second bill was merely a collateral security. It was on the other hand urged, that the second bill being received without fraud or collusion, suspended the remedy on the first, and consequently that time was given to the acceptor.

Per Cur. It is necessary, for the purposes of commerce, that a plain rule should, in cases of this description, be laid down, and that nothing should be left for conjecture. If time is given by the holder to the acceptor of a bill, the other parties to it are discharged; but then it must clearly appear that it was the intention of the holder to give time. We must not look about to see if we can infer it. Here there was no communication between Gidden and Son with Thompson as to giving time. The second bill was merely a collateral security, the taking of which can in no instance be construed into a gi-

ving of time for payment, unless the party at the same time bind himself not to And the sue on the first bill until the second is due. Rule discharged. See 2 B. & P. 61; 1 T. R. 167; 2 id. 186; 2 Ves. jun. 540; 1 B. & P. 152-5; 2 id. 61. 3 id. 363; 5 T. R. 513; 4 M. & S. 226. rule appli cable to ac commodation bills, that giving time to the

6. HILL v. READ. Middlesex Sittings after Hilary Term, 1822. 1 D. & R. N. P. C. 26. S. P. COLLETT v. HAIGH. M. T. 1812. N. P. 3 Campb. 281. time to the

Declaration by indorsee against drawer of an accommodation bill, drawn for the benefit of the acceptor. The bill was dishonoured, upon which plaintiff took a promissory note from the acceptor for the amount. This act of plaintiff's it was, however, urged, did not operate as a discharge to the drawer, this being an accommodation bill. But Abbott, C. J. said, that the exception as to accommodation bills extended only to cases where the action was brought against the party for whose accommodation the bill was drawn; and that therefore the defendant, in the case before him, had a good defence to the action, the defendant having clearly given time to the acceptor.—Plaintiff nonsuited. does not in validate the holder's claim a gainst cer tain parties whose names stand prior to the holder's on the bill, ex tends only to cases where the action is brought a gainst the party for whose ac commodation the bill is made.

7. WALWYN v. St. QUINTIN. H. T. 1797. C. P. 1 B. & P. 652; S. C. 2 Esp. 519. The plaintiffs in this action were holders of a bill of exchange, drawn by the defendant on and accepted by A., in favour of B., who indorsed it to the plaintiff. The bill was dishonoured and protested; and on the plaintiff's insisting on instituting proceedings against A. and B. in case of non-payment, B. paid on account; and the plaintiffs, on a representation by a friend of A. [498] that he would probably be able to discharge his acceptance at a distant period, gainst the forbore to sue him. The jury having found for the defendant, and a rule nisi party for a new trial having been obtained, it was objected, on the part of the de fendant, that as the plaintiffs had neglected to pursue A., the acceptor, they were bound by their own laches. But Eyre, C. J. said, the principle on which the grant of indulgence to an acceptor before notice is held to be a discharge to the drawer is, that the holder, by such indulgence, treats absolutely with But giving time to an acceptor af ter protest of a bill of exchange, does not discharge or prolonging the old credit with the acceptor, have operated as a discharge between the holder and drawer, but this does not appear to have been the case; after notice to him thereof. engagement, unless they have the effect of producing laches on the part of the holder.—Postea to the plaintiffs.

8. CLARIDGE v. DALTON. T. T. 1815. K. B. 4 M. & S. 226.

Indorsee against drawer. Defence, that plaintiff's agent had given time to the payee. It did not appear that the plaintiff had authorised him so to do; payee, will but on a rule nisi for nonsuit, and cause shown, the Court expressed a clear opinion that if he had, it would not affect the liability of the drawer; for he might nevertheless pay the bill, and enforce his remedies against the acceptor. Sed 2 B. & P. 61. So giving time to the payee, will not dis charge the drawer.

(e) By taking another security.

1. WITHALL v. MASTERMAN AND OTHERS. T. T. 1809. N. P. 2 Campb. 178.

The holder of a bill of exchange, on its becoming due, allowed the acceptor to renew it without consulting the indorser; however, afterwards, when he told the indorser, he said it was the best thing that could be done. It was contended, that the posterior assent to the transaction was equally as binding as a previous authority; but Lord Ellenborough, C. J. said, the indorser was discharged, because that was not a recognition of the terms granted ment, with out his con

* Taking the separate notes of one or several partners, at distant dates, as a collateral sent,* al security, will not discharge the others, if the party insists at the time it shall not prejudice though he his claim upon the partnership, and he does not bind himself to wait till the notes are due; afterwards Bedford v. Deakin, 2 Stark. 178; S. C. 2 B. & A. 210. abridged post, Partners; though the said to the partnership is dissolved before such separate notes are given. acceptor it

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was the
best thing
that could
be done.

by the holder to the acceptor of the bill; but such approbation must be considered as referring to the acceptor, to whom the arrangement was obviously advantageous.—Verdict for plaintiff.

2. SCOTT v. LIFFORD. H. T. 1803. K. B. N. P. 1 Campb. 246.

But merely
depositing
with the
payee poli-
cies of insu-
rance as a
collateral
security,
does not
discharge
the drawer.

Payees against the drawer of a bill of exchange. The defence was, that the bill was drawn without consideration, and that the plaintiffs had received satisfaction. Agar having an acceptance due to the plaintiffs, requested it renewed, to which they consented, provided that the defendant would draw a bill upon Agar for the amount which he was to accept, and which was accordingly done. Agar also lodged policies of insurance to a large amount with the plaintiffs, by way of collateral security, upon which a certain percentage had since been awarded, due upon them. Lord Ellenborough held that the bill was not an accommodation bill, there having been a consideration between the payees and the acceptor, and that if it had been proved that the plaintiffs had received any thing upon the policies, that would *pro tanto* be a satisfaction and that the plaintiffs were entitled to recover the whole sum mentioned in the bill, and must deliver up the policies, or refund the money received under them.

- (f) *By neglecting to present for acceptance.* See div. Acceptance, ante.
(g) *By neglecting to give notice of refusal to accept.* See div. Notice of non-acceptance.
(h) *By neglecting to present in due time for payment.* See ante, div. Payment.
(i) *By neglecting to give notice of non-payment.* See ante, div. Notice of Non-payment.

(j) *By taking the acceptor or maker in execution.*

1 HAYLING v. MULLHALL, M. T. 1778. C. P. 2 Blac. 1235.

Merely tak-
ing a party
to a bill in
execution,
will not dis-
charge any
other ante-
cedent par-
ty.

A bill was indorsed by Sheridan to Boon, and by him to the plaintiff; he sued Boon, and took him in execution, but discharged him upon a letter of licence; he then sued Sheridan, for whom the defendant became bail; and upon this action, it was insisted that the debt was satisfied by the imprisonment of Boon. *Sed per Cur.* The bill holder has a right to sue all the indorsers till the bill is satisfied. Each indorser is independant of the rest. The law so highly regards the liberty of the subject, that the taking his body in execution by *capias ad satisfaciendum* is, with respect to him, a full satisfaction of the debt, but it only operates as a discharge to the identical person so imprisoned; it does not discharge even his goods after his death; by the statute of Jac. 1. the remedy still remains in force (after his death or discharge) against every other indorser, notwithstanding this ineffective *capias ad satisfaciendum* in like manner as if the plaintiff had sued out an unproductive *feri facias* against Boon, else two securities would not be better than one. Rule to stay proceedings on payment of debt and costs.

2. SMITH v. KNOK. M. M. 1799. C. P. N. P. 3 Esp. 46.

But that
has been
questioned.

Per Lord Eldon, C. J. It is said that the holder may discharge any of the indorsers after taking them in execution, and yet have recourse to others. I doubt the law as stated so generally. I am disposed to be of opinion, that if the holder discharge a prior indorser, he would find it difficult to recover against a subsequent one. See 2 B. & P. 62,

(k) *By taking a composition.*

MALLET v. THOMPSON. M. T. 1804. K. B. N. P. 5 Esp. 178.

Taking a
composition
from the
payee of an
accommoda-
tion note,
does not
discharge
themaker.*

The plaintiff, the holder of an accommodation note, who had taken it with full knowledge that the maker had received no value from the indorsee, for whose accommodation the defendant made it; and had received a composition;

* But if the holder of a bill compound with the acceptor or other party, without the assent of the drawer, or other subsequent parties, he thereby releases them from their liabilities, if they had effects in the hands of the acceptor or prior indorser; for there is a material distinction between taking a sum of money, in part satisfaction of a debt, as in the case of a dividend, and taking a sum in satisfaction of such debt, where the party has an option to refuse less than the whole, as where he compounds with the acceptor, and thereby deprives all other parties to the bill of the right of resorting to him; see 11 Ves. 410; 8 Ero. C. C. 1. And where the indorser of a bill of exchange becomes bankrupt, and the

and covenanted not to sue such indorsee; was allowed, by Lord Ellenborough C. J., to recover in an action against the defendant, as maker; though on payment of it, he would have a right action against the indorsee.

(l) *By proving under a commission of bankruptcy* See ante, vol. iii. p. 632.

If the acceptor of a bill, on its arriving at maturity, be a bankrupt, the holder may, without the assent of the other parties, prove the bill under the commission, and receive a dividend or dividends; and such conduct will not discharge the other parties to the bill from their respective liabilities to him, if he have given regular notice of non-payment. See 11 Ves. 412; 1 B. & P. 286.

(m) *By acceptor of bill or maker of note being discharged under the insolvent act.*

M'DONALD v. BOVINGTON. T. T. 1792. K. B. 4 T. R. 825.

A bill was drawn by M'Donald on Bovington, and indorsed to one Thompson, who charged the latter in execution upon it; he was, however, discharged as an insolvent, and then Thompson sued M'Donald and recovered. M'Donald paid the bill, sued the defendant and charged him in execution; and on a rule for his discharge, on the ground that the defendant had satisfied the bill, by being charged in execution at the instance of Thompson; the Court observed, that the consequence of such a doctrine would be, that because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged without paying either. Besides, upon the drawer being called on to pay in default of the acceptor, it raises a new cause of action against him. See post, tit. Insolvent Debtor.

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The mere circumstance of one of the parties to a bill being discharged as an insolvent, does not preclude the holder from proceeding against the other parties.

Taking a warrant of attorney to enter up judgment, is not, unless judgment is actually entered up, even an extinguishment.†

XVI. RELATIVE TO THE THE EXTINGUISHMENT AND SATISFACTION OF A BILL OR NOTE.*

1. NORRIS v. AYLETT. M. T. 1800. K. B. N. P. 2 Campb. 329.

An action having been brought against the acceptor of a bill of exchange, it was agreed between the parties that the defendant should pay the costs, renew the bill, and give a warrant of attorney to secure the debt. The defendant gave a warrant of attorney and renewed the bill, but did not pay the cost. The plaintiff brought a fresh action on the bill; and Lord Ellenborough, C. J. said, there was to be no extinguishment of the bill until, amongst other things, the costs were paid. If they had been paid, this might have brought it within the case of Kearslake v. Morgan, 5 T. R. 513. But the agreement remaining unperformed on the part of the defendant, the plaintiff reserved to himself the power of rendering the bill available. This is like award without satisfaction.—Verdict for plaintiff.

2. CLAXTON v. SWIFT. M. T. 1685. K. B. 2 Show. 441. 494; S. C. Lutw. 882.

To an action against the indorser of a bill, the defendant pleaded, that the plaintiff had recovered judgment against the drawer, and that the judgment was still in force. On demurrer, the Court of King's Bench held the plea good; but the Court of Exchequer Chamber held otherwise, and reversed the judgment.

3. ATWOOD v. CROWDIE. M. T. 1816. K. B. N. P. 1 Stark. 483.

Defendants lent their acceptances for the accomodation of Matingley and Co., to two bills at three and four months after date, payable to Matingley holder proves the amount of the bill under his commission, and afterwards compounds with and discharges the acceptor, without the consent of the assignees of the indorser, he thereby also discharges the indorsers estate, and the proof of his debt must be expunged; 3 Bro. C. C. 1; Cooke, B. L. 168; Cullon, 158; 1 Mont. B. L. 546; 11 Ves. 410. And though the agent of the holder by mistake signed a composition deed in favour of the acceptor, thinking that the proceedings were a bankruptcy, it was decided that the drawer was discharged; 11 Ves. 410.

* The difference between extinguishment and satisfaction is, the holders claim upon a bill or note may be extinguished as to some parties, and remain entire as to others; if his claim is satisfied as to any, it is satisfied as to all.

† But taking security of a higher description, as a bond or judgment, for the money due upon a bill or note extinguishes the holders claim upon the bill or note as against the party giving that security, but it does not satisfy it; Bac. Ab. tit. Extinguishment, D. vol. iii. p. 106.

Obtaining judgment is no satisfaction, even as to the parties subsequent to him, a

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against whom the judgment is obtained. So if a customer deposit with his banker, bills or notes of a third person on account and they are suffered to remain with the banker after they are due, it will be no satis

faction of them, that at the time they became due, and at subsequent periods the balance between the banker and customer was in favour of the customer.

But satisfaction of a bill or note as to one of several parties, is a satisfaction as to all; and if a person is partner in two firms, satisfaction as

Where the acceptor of a bill was separately sued as such, and sued jointly with others as drawer, the Court refused to stay the proceedings in one action, as being vexatious, on the ground that he was liable in two characters

and Co. or order. M. and Co. having been pressed by their bankers for security, sent them these and other bills on account. At the time these bills became due, and at several periods afterwards, the balance between Matingley and Co. and the bankers was in favour of Matingley and Co.; but Matingley and Co. failed, and the balance then was the other way. The bankers sued defendants upon these acceptances. Defendants insisted, that as the balances were against the bankers when these bills became due, and afterwards, these bills must be considered as satisfied, or at least that plaintiffs must stand as if the bills had been indorsed to them after they became due. But Lord Ellenborough held, that as the bills were sent on account, which must have meant the floating account, though there were periods at which the plaintiffs had no claim upon them, and they might have been demanded back; yet as they were suffered to remain, the plaintiff's claim reverted, when by fresh advances, the balance turned in their favour; and the plaintiffs had a verdict.

4. JACAUD AND GORDON v. FRENCH. E. T. 1810. K. B. 12 East. 317.

Jacaud was in partnership with Blair in Ireland, and with Gordon here. Jacaud and Gordon had a bill drawn by Farrell and Co. on defendants, and Farrell and Co. supplied Jacaud and Blair with funds to pay this bill. Blair misapplied those funds; and on an action on the bill by Jacaud and Gordon, the defence was, that the misapplication by Blair was, in law, a misapplication by Jacaud also, although he might be ignorant of the fact; and that after being guilty in one house of disappointing payment by misapplying the payment fund, he could not endeavour to enforce payment in another. The Court were of that opinion, and the *postea* was awarded to defendants. to one firm, is so to both; and it will make no difference, though one common partner is in fact ignorant of the circumstances which constitute the satisfaction.

XVII. REMEDY UPON BY ACTION.

(A) REMEDY AGAINST A PARTY WHO HAS SUBSCRIBED HIS NAME IN TWO DISTINCT CHARACTERS.

WISE v. PROWSE. T. T. 1821. Ex. 9 Price. 393.

A bill was drawn by T. S., J. P., and the defendant, partners, under the description of S., P., and Co. on the defendant, and accepted by him in favour of the payees, who indorsed it over to the plaintiffs. The bills being dishonoured, they commenced two distinct actions, one against the defendant as acceptor, and the other against the drawers, making also the defendant a party to that action. On a rule to show cause why the proceedings in this action against the defendant, as acceptor, should not be staid; it was opposed on the ground, that the defendant was liable on the same bill in two distinct characters, as drawer and acceptor. And,

Per Cur. As the defendant is liable in the two characters, which could not be comprised in the same declaration, the plaintiff is entitled to both remedies; and therefore the proceedings in one cannot be staid.

(B) ELECTION AS TO WHOM TO BE SUED, AND WHO MAY SUE. See ante, div. Extinguishment and Satisfaction, p. 501.

1. ANON. E. T. 1693. K. B. Skin. 343.

Any of the parties to a bill may be sued until payment by the acceptor. Action on the case upon a bill of exchange, drawn upon J. S. by J. B., and accepted by him, payable to J. D., who indorses it to J. G. who indorses it over; and an action is brought by the last indorsee against the first indorser. And Holt, C. J. said, that it will lay. for the indorsement is *quasi* a new bill, and a warranty for the indorser that the bill is void, and the party has his liberty to bring his action against any of the indorsers upon the bill not being paid by the acceptor.

2. RANDOLL v. BELL. T. T. 1813. K. B. 1 M. & S. 714.

A person may sue on a bill, payable to him, though in trust for a third party, A. B. holding bills of exchange accepted by C. D. in trust for the plaintiff, upon their becoming due, commenced an action against C. D. and afterwards became bankrupt, and a commission issued, under which the defendant was chosen assignee. The defendant afterwards brought an action in his name against C. D. and it being subsequently necessary to sue the sheriff for an es-

cape, he obtained the amount of the bills on which C. D had been arrested, by means of the sheriff having suffered judgment by default; and a writ of inquiry having been executed in defendant's favour, some evidence was brought forward at this cause, which was instituted by the plaintiff to recover the money which was so recovered from the sheriff by the defendant; that during the pendency of the proceedings against the sheriff, the attorney for the defendant had promised the plaintiff, that the defendant should be accountable to him for the amount of the bill if he recovered against the sheriff; and it was admitted by the defendant, that if the money recovered against the sheriff could be looked upon as the produce of the bill, the plaintiff would be entitled to recover. A nonsuit was, however, directed at the trial, the judge holding, that the action against the sheriff being for a tort, the money recovered could not be considered as money received on the bill. A rule nisi had been obtained to set aside the nonsuit. Per Lord Ellenborough, C. J. The action for an escape was for an escape upon the *mesne* process, and does not range within the statutes which give an action of debt, against the sheriff or gaoler, to recover at once the sum for which the prisoner was charged in execution. It is only an action at common law, and the damages given are for the misconduct of the officer, and not in satisfaction of the debt; and, therefore, the money recovered cannot be considered as money had and received to the use of the plaintiff. If it should be asked, whether the assignee, after having recovered the amount of the bill against the sheriff for the tort, might still recover against C. D., it may be answered, that it seems he might, because the former recovery for the default of the sheriff was collateral to the debt, and entirely matter of damages. It is true that the assignee, upon the trial of the action against the sheriff, was bound to show that something was due upon the bill, but still the debt due on the bill was not the cause of action, but the injury arising to him from the delay occasioned by the escape, the damages for which injury were not limited by the amount of the bill, but might have been more or less. Under all these circumstances, I am therefore at a loss how to decompound the verdict, and appropriate so much on account of damages and so much for the debt, so as to determine specifically to what amount the defendant is to be considered as trustee for money had and received to the use of the plaintiff. As to the conversation of defendant's attorney, supposing it to be an agreement, it was not such an agreement as was within the scope of his authority to make, and therefore will not vary the question; for how can it be argued he had a right to undertake that the defendant should be liable to pay over all the money he should recover, without being recompensed any of his expenses? It does not appear that any reservation of that sort was stipulated for. In a court of equity the defendant may be compellable to pay over this money, but that will be after reimbursing himself all the costs and expenses. The plaintiff will not be, however, prejudiced by not being allowed to recover in this action, for he has his remedy first by trover against the defendant if he withholds the bill, and afterwards by action on the bill itself, to which the recovery of the defendant against the sheriff cannot be pleaded in bar.

Sed per Cur. The conclusion of the learned Chief Justice's judgment is a sufficient reason, of itself, to induce us to hold that the plaintiff is entitled to recover. Multiplicity of suits is always to be avoided. If we, therefore, consider the damages recovered by defendant as a payment in satisfaction of the bill, it may save an action of trover, and other circuitous modes of action. But our decision rests on a firmer basis, and on the strict construction of the law. It has not been disputed, that if A. B., or his assignee, had recovered on the bill against a party to the bill, the money might have been recovered from him who had no right to the bill, by the plaintiff who was entitled to it. Now upon strict legal principles, we think we may decide in favour of the plaintiff; for we are of opinion that we are at liberty to consider the action against the sheriff as a continuation of the original action, so as to give the plaintiff the fruit of it; and we are more inclined to this opinion, when we cannot but observe, that the damages given against the sheriff are the precise amount of the debt due

it has been held that where the assignee of such a trustee arrested a party liable on the bill, whom the sheriff permitted to escape, and thereupon recovered in case against the sheriff damages to the amount of the bill, that the [504] *cestui que trust* might recover from the assignee in an action for money had and received, the amount of the damages so adjudged to, and actually received by, him.

[505] to the original party; and we should have great difficulty in saying that A. B., or his assignee, could have recovered beyond the amount of the debt, with interest and costs, more especially where he only sued as trustee; for this is an action for satisfaction, not for vindictive damages. On what ground let us ask, was the defendant at all entitled to his action against the sheriff? Not on the ground of being entitled in his own right, nor in the right of A. B. as principal, for no debt was due to him in that character; but the only ground of action was, his having been prevented from recovering what was due to the plaintiff. It seems to us also, that the recovery against the sheriff would defeat any future action in A. B.'s name against C. D. upon the bill; or if the plaintiff, instead of A. B. were to institute an action, C. D. might defend himself upon the same ground. Then, what difference does it make, that here the action is by A. B. and his assignee? We must make the rule absolute, and hold that the plaintiff is entitled to recover the whole sum for which the defendant had a verdict in his action against the sheriff, minus the costs and expences incurred by the defendants during such proceedings.—Rule absolute. See 3 Wils. 304; 2 T. R. 129; 4 T. R. 611.

(C) PAYEE OR BEARER AGAINST ACCEPTOR OF A BILL, OR MAKER OF A NOTE.

(a) *Form of action.*

Special assumpsit is the only form of action that can be sustained; *Hard's* case, 1 Salk. 23; *S. C. Hardres*. 486; *S. P. Mines v. Sculthorpe*, 2 Campb. 215. abridged *ante*, vol. ii. 414; by payee against acceptor of a bill of exchange; *Webb v. Geddes*, 1 Taunt. 540. abridged *ante*, vol. ii. 414. But *debt*, or *indebitatus assumpsit*, will lie by the payee against the maker of a note expressed to be for *value received*; *Bishop v. Young*, 2 B. & P. 78. abridged *ante*, vol. ii. 414; see 1 Mod. Ent. 312. pl. 13. unless it be brought on a note payable by instalments, where the whole debt is not due; *Rudder v. Price*, 1 H. Bl. 547. abridged *ante*, vol. ii. p. 414.

(b) *Affidavit to hold to bail.* See *ante*, vol. i. from 406 to 410.

(c) *Arrest.*

The 12 Geo. 1. c. 29. requires, that the sum due on bills of exchange and promissory notes should amount to 10*l.* otherwise the defendant cannot be holden to bail. This regulation was not altered or affected by the now expired act of the 51 Geo. 3. c. 124. s. 1. which rendered it necessary that the debt in other cases should amount to 15*l.*

A right of action accrues immediately to the holder of a bill or note against all the antecedent parties, either on its non-acceptance or non-payment; and if such a security be transferred to the holder by mere delivery, without indorsement, on account of a precedent consideration, the party who delivered it may be holden to bail for the original debt, as well as any other party to the bill or note, either successively, or all at one and the same time.

[506] Where part of the amount, secured by the instrument, has been paid, the party should only be holden to bail for the balance.*

Where a bill or note is payable by instalments, and it contains a clause, that on a failure of payment of any one instalment, the whole shall become due, the holder is entitled to the security for bail to the whole amount of the sum for which it was given; see *Cro. Jac.* 504; 1 H. Bl. 547; but where the instrument does not contain such a clause, the right to bail is limited to the instalment due at the commencement of the action; see 1 N.R. 330; 4 East. 75.

(d) *Bail.*

The circumstance of the bail being liable to the plaintiff on the same instrument on which the action is brought will not render the bail incompetent if he be otherwise qualified. Thus an indorser of a bill of exchange may be bail for the drawer in an action against the latter upon the same bill, notwithstanding the apparent objection that the plaintiff's security would not be increased by the recognisance of the indorser; *Harris v. Manley*, 2 B. & P. 526; *Mitchell's bail*, 1 Chit. Rep. 287; *Steven's bail*, 1 Chit. Rep. 305; abridged, *ante*, vol. iii. p. 115.

* See *vide Johnson v. Kannion*, 2 Wils. 262. abridged *ante*, from which it would ap

(e) *Declaration.*1. *Of the venue.*[†]

1. KIRK v. BROAD. M. T. 1751. K. B. Say. 7.

A rule having been obtained for changing the venue in an action of *assumpsit* upon a promissory note, Lee, C. J. said, it is the settled practice of this court that the venue may be changed in any action, the right of which is founded upon a simple contract,

2. HOLCROFT v. COLLWEST. M. T. 1737. K. B. And. 65. S. P. ANON. E. T. 1706. K. B. 11 Mod. 52. S. P. PRECCOUR v. BENNETT. E. T. 1783. K. B. 1 Tidd. 653. n. i. 8th edit.

It was formerly held on in the K. B. that the venue in an action upon a bill or note might be changed.

But it seems now to be settled in that court, as well as [507]

Motion to discharge a rule on the common affidavit for changing the venue from London to Lancaster; in an action upon a promissory note. The counsel argued, that the venue is never changed in actions on bonds, and there is the same reason against changing the venue in the case of notes, they being considered, since the statute of Anne, in the nature of specialties. And the same requisites are necessary to be proved at the trial in both cases. He cited Elliott v. Mann, *supra*. But the whole Court, (except Chapple, J.) were against discharging the rule, but that learned judge inclined to the contrary, observing, that in actions on a deed or specialty the venue is never changed, and the books relating to mercantile affairs call promissory notes by the name of specialties. He referred to the cases in the Common Pleas, *infra*.

3. WARD v. COLCLOUGH, T. T. 1734. Ca. Prac. C. P. 119; S. C. Prac. Reg. 417; S. C. Barnes. 430. S. P. RICE v. VINAL. H. T. 1733. Prac. Reg. 417; S. C. Barnes. 483. WATSON v. WILLIS. M. T. 1736. C. P. Prac. Reg. 418. THE DUKE OF BEDFORD v. BRAY. M. T. 1744. C. P. Barnes. 491. DAVIES v. GRACE. M. T. 1745. C. P. Barnes. 485. MAUGIR v. HINDS. H. 1747. C. P. Barnes. 487. DOWNES v. BRIAN. E. T. 1775. C. P. 2 Bl. Rep. 993. VIGGERS v. VIGGERS. T. T. 1736. Cook Rep. 78.

The Court refused to grant an application for leave to change the venue on a bill of exchange or a promissory note, for these instruments are in the nature of specialties. See Whitburn v. Stainer, *ante*, vol. ii. p. 222.

4. EVANS v. WEAVER. E. T. 1797. C. P. 1 B. & P. 20. ANON. T. T. 1781. K. B. 1 Tidd. 653. 8th edit. n.

† Action on a promissory note. A rule *nisi* had been obtained to change the venue from London to Shropshire, on an affidavit that the defendant had a good defence in the latter county, and that all his witnesses resided there.

Per Cur. The affidavit does not state that the defendant has a number of witnesses in Shropshire; if he had, and it could be shown that a serious inconvenience would arise from bringing them up, it might induce the Court to deviate from the general rule.

It was afterwards shown, by the production of affidavits, that the defendant had three witnesses in Shropshire, and that he would have to prove a judgment in a local court. Under these circumstances the rule was made absolute. See Foster v. Taylor, 1 T. R. 781. and cases cited in note.

5. SHEPHERD v. GREEN. E. T. 1814. C. P. 5 Taunt. 576.

A rule *nisi* for changing the venue in this cause, was opposed on an affidavit that the action was brought partly on a real promissory note. The Court said that the cause shown was sufficient, but that had the note counted on been fictitious for the purpose of laying the venue any where, they should have granted the rule.—Rule discharged.

6. HART v. TAYLOR. M. T. 1822. K. B. 2 D. & R. 164.

Plaintiff declared upon a promissory note, with a count for goods sold and delivered, and laid his venue in London, and afterwards delivered a bill of particulars, reversing the order of his demands. A motion was made for a

verdict, that a verdict might be taken for the whole amount.

* An action on a bill or note is transitory, the venue may be therefore laid in any county.

† And exchequer; see Greenway v. Carrington. 7 Price, 564; *et post*. 508.

Even where an affidavit is produced, that the real cause

[508] rule to change the venue to Lancashire, on an affidavit that the real cause of action was goods sold and delivered, arising in the latter county, and not elsewhere. *S. d. per* Layley, J. If the existence of the promissory note had been negatived, and it had been stated in the defendant's affidavit that a count was only inserted in the plaintiff's declaration for the purpose of preventing him from changing the venue, the Court might have granted the rule. As the Court cannot, however, separate the causes of action, the rule must be refused.—Rule refused. See 5 Taunt. 576.

Yet it seems that where the venue in an action upon a bill for an inconsiderable part of the real debt has been changed, the Court will not allow it to be brought back again. The declaration must not be entitled before the bill or note appears to have become due, or dishonoured. Where it is alleged that the bill or note bears date on a particular day, the date must be correctly stated. But where it is only alleged to have been drawn on a certain day not stating its date of the bill, a variance between the days will be immaterial.

7. *GREENWAY V. CARRINGTON.* T. T. 1819. Ex. 7 Price. Rep. 565.

This was an action by the drawer of a bill of exchange against the acceptor, which had been given in part payment for some goods sold and delivered. A rule had been obtained to change the venue, but a motion was subsequently made to bring it back, on the ground of its being a bill of exchange. But the Court held that this case could not be brought within the general rule, that the venue in an action on a bill of exchange cannot be changed; the bill having been given for an inconsiderable portion of the goods, the action must virtually be considered as brought for the latter demand, for otherwise a plaintiff by inserting a count upon the bill, might almost in any case deprive the defendant of his right to change the venue.

2. *Of entitling the declaration.*

BELLASTYSE V. HESTER. T. T. 1697. C. P. 2 Lutw. 1589.

The plaintiff sued by writ of privilege, and declared upon a bill of exchange bearing date 1st May, 1697, and directed to the defendant, to pay the plaintiff 10*l.* ten days after sight; that the defendant, 7th May, 1697, saw and accepted the bill according to custom, &c. the defendant cravedoyer of the writ, which being tested 17th May, 9 W. 3. he prayed judgment of the Court, and declaration that the writ was brought before the cause of action accrued.—Judgment for the defendant. See 1 T. R. 116; 1 Saund. 40. n. 1. Carth. 113; 2 Bl. Rep. 735; 3 Wils. 154; 2 Lev. 176; 1 Vent. 264; 1 East. 499.

3. *Of the count stating the bill or note.**

(a 1) *As to date.*

1. *ANON.* M. T. 1809. N. P. 1 Campb. 308. n. *Semb.* S. P. STAFFORD V. FORCER. E. T. 1715. C. P. 1 Stra. 22. 807; S. C. 10 Mod. 311.

The declaration alleged that the defendant, on, &c. made his certain bill of exchange in writing, bearing date the same day and year aforesaid, and the real date of the bill was different; The Court held the variance to be fatal. See *Matthews v. Spicer*, ante, vol. ii. p. 427; 1 Selw. N. P. 350. 4th edit.; Fitzg. 130; 16 East. 420; 1 B. & A. 690.

2. *COXON V. LYON.* Lent. Ass. 1810. Cited 2 Campb. 307.

The declaration stated that the defendant, on the 3d of February, 1810, made his bill, requesting the drawee to pay on a particular day; the bill was in fact dated 6th February, 1810, but no date was stated in the declaration. On an objection on the ground of a variance, it was urged that the declaration does not allege the date as part of the bill, but only alleges that defendant on that day drew the bill. And of that opinion was Thompson B. who held the it to be the variance immaterial for that reason.

3. *GILES V. LOUNGE.* H. T. 1817. K. B. 2 Chit. Rep. 300.

Demurrer to declaration on a bill of exchange, because no date was alleged. Per Lord Ellenborough, C. J. Its delivery is its date. The date is only in general not left to parol evidence, but stated on the face of the bill.—Judgment for plaintiff. See 3 B. & P. 173.

* The bill or note should be described, in the terms it was really made, or according to its legal effect and operation.

† And if a bill or note by mistake has been dated contrary to the intention of the parties, the declaration may run thus, "on, &c. the time intended at, &c. made, &c. bearing date by mistake, on, &c. but meant and intended by the said A. B. and C. D., to be dated on the said, &c. and then and there delivered, &c. by which said note, he, the said C. D., then and there promised to pay two months after the date thereof, that is to say; after the said, &c. when the said note was so made and intended to be dated as aforesaid to the said A. B. &c."

4. HAGUE, ONE, &c. v. FRENCH, T. T. 1802. Ex. Ch. 3 B. & P. 173. S. P. If a bill be drawn, pay-
DE LA COURTIER v. FELLAMY. 2 Show. 422. able at a certain

Assumpsit on a bill of exchange. The first count of the declaration stated that R. C. "heretofore, to wit, on, &c. at, &c. according to the usage, &c. drew her certain bill of exchange in writing, bearing date, &c. and thereby required the defendant below, to pay to the plaintiff below, two months after the date of the said bill, the sum, &c. and alleged acceptance, and a promise to pay, by the defendant below. It was proved that the bill was without any date expressed. It was contended for the plaintiff below, that on the authority of *De la Courtier v. Bellamy*, *supra*, if a bill be drawn, payable at a specified time after date, such time must be computed from the day on which the bill is actually drawn. Judgment having passed for the present defendant, the defendant below brought error; but the Court being of opinion that the case cited was precisely similar to the present, affirmed the judgment. [510]

5. FENTON v. GOUNDRY. E. T. 1811. K. B. 13 East. 458.

Account on a bill of exchange was objected to on the ground that the only date given to the demand of payment of the bill, and of the defendant's promise, was by reference to the 1st of July, the date on which it was stated to have been drawn, which was one month before it became due. But the Court said that the date of the demand and promise to pay was laid under a *videlicet*, and stated to be *afterwards*; and it was clearly no substantial cause of demurrer; and if meant to be relied on as an objection, it ought to have been stated as a special cause of demurrer, which it was not. A declaration on a bill of exchange, stating that a bill was drawn on the 1st July, payable at a future day, and that "afterwards, to wit, on the same day," payment was demanded, was held good on general demurrer.

6. WELLS v. GIRLING. H. T. 1819. C. P. 8 Taunt. 737; S. C. 3 Moore. 79; S. C. Gow. 21; S. C. not S. P. 4 Moore. 78; S. C. 1 B. & B. 447.

The declaration of a bill of exchange, which was made payable by four instalments, stated that the last instalment was to be paid on the 4th June, whereas at the trial it was proved to have been payable on the 24th of that month; held a variance. If a declaration on a bill of exchange, payable by instalments state the last instalment to be payable on a day different from that proved it is a fatal variance.

(b 1) *Describing the place where made.*

1. HOURIET AND ANOTHER v. MORRIS. M. T. 1812. N. P. 3 Campb. 303.

An objection was taken in the above case to the declaration, which stated the note, for which the present action was brought, to be made in London, when, in fact, it was made at Paris; but Lord Ellenborough said the venue was transitory, and the place where it purports to have been made is immaterial.—Verdict for plaintiff.

2. KEARNEY v. KING. H. T. 1819. K. B. 2 B. & A. 301; S. C. 1 Chit. Rep. 28. S. P. SPROWLE v. LEGGE. M. T. 1822. K. B. 1 B. & C. 16; S. C. 2 D. & R. 15.

The declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, &c. for a certain sum therein mentioned, without alleging it to be at Dublin in Ireland. A question was made, whether such a bill, upon the face of it, must be taken to have been made at Dublin in Ireland, and to be payable there. *Per Cur.* The Court must see upon the face of the record that the bill was drawn in Ireland, and it cannot take notice judicially that a bill drawn at Dublin is drawn at Dublin in Ireland. And it seems that a statement in a declaration that a bill was drawn at Dublin, to wit, at Westminster, does not convey the idea that it is an

(c 1) *Describing the bill or note to have been made according to the custom of merchants or statute of Anne.*

1. CARTER v. DOWRISH. M. T. 1689. K. B. Carth. 83. S. P. GLOVER v. COPE. H. T. 1686. K. B. Tkin. 265. S. P. FAIRLEY v. ROCH. M. T. 1687. C. B. 1 Lutw. 368. S. P. DEATH v. SERWONTERS. H. T. 1684. 1 Lutw. 365. HODGES v. STEWARD. E. T. 1693. K. B. 3 Salk. 68. BEL-

* But it is usual to state the place at which the bill or note purports to have been made, as at "York," to wit, at "Westminster in the county of Middlesex," or at "Leghorn," to wit, at "London." Though it is stated, in a work of authority, (*Boyl on Bills*, 305, 4th edit.) that in an action on inland bills and notes, although they may bear date at a particular place, yet they may be alleged to have been made any where in England or Wales.

Irish bill.

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LASIS A HESTER. M. T. 1697. K. B. 1 Ld. Raym. 288; S. C. 2 Lutw.

1591. S. P. EWERS v. BENCHKIN. M. T. 1688. C. P. 1 Lutw. 82.

Writ of error from the C. P. to K. R., in an action on a covenant to pay all bills which T. S. should draw on the defendant, payable to the plaintiff or order. Breach, that T. L. had drawn a bill pursuant to the covenant, but the defendant had permitted it to be returned dishonoured. The latter pleaded that the plaintiff, *secundum consuetudinem mercatorum*, had indorsed the bill to J. N., who indorsed it to J. D., and that he the defendant had paid 100*l.*, part thereof, to J. D., and tendered the residue to him, which he refused to accept. Demurrer to plea, assigning for cause that the defendant had not duly set forth the custom of merchants. But the Court considered that they ought *ex officio* to take notice of the law of merchants, and decided that the plea was good, intimating that the decision might have been different as to a declaration, for there the plaintiff should set forth what is the custom of merchants.

2. BURMAN v. BUCKLE. M. T. 1684. K. B. 2 Show. 459; S. C. Comb. 9.

Assumpsit on a bill of exchange founded on the custom of merchants. The declaration alleged, that if a bill by a merchant be indorsed payable to a merchant or bearer, then, &c.; but it was not averred that the merchant was a trader. The declaration was holden bad on demurrer.

3. SOPER v. DIBLE, H. T. 1696. K. B. 1 Ld. Raym. 175. S. P. FREDERICK v. COTTON. E. T. 1678. K. B. 2 Show. 8 S. P. PINKNEY v. HALL. H. T. 1696-7. K. B. 1 Ld. Raym. 175. ERESKINE v. MURRAY. M. T. 1728. 2 Ld. Raym. 1542, EWERS v. BENCHKIN. M. T. 1688. C. P. 1 Lutw. 82.

Declaration in *assumpsit* upon a bill of exchange. The plaintiff declared that, *secundum consuetudinem et usum mercatorum*, the acceptor is bound to pay &c., without showing the custom at large. Demurrer. Judgment for plaintiff, the Court observing, that it was the better way not to set out the custom at large.

[512] 4. ERESKINE v. MURRAY. M. T. 1728. K. B. 2 Ld. Raym. 1542. HUSSEY v. JACOB. 1 Ld. Raym. 88. CARTER v. DOWRISH. Carth. 88. MANNE v. CARAY. 1 Lutw. 279.

William Murray brought an action against the defendant, Sir John Ereskine on an inland bill of exchange; wherein he declared, that he on the 1st of March, 1727, at Westminster, in the county of Middlesex, made his bill of exchange in writing to the said Sir John directed, and by the said bill requested the said Sir John, on the 10th day of the said month of March, to pay to the said William Murray, or order, at his mansion-house in Edinburgh, 200*l.* sterling, for value in the hands of him the said John, out of moneys lent by the said William; that the defendant Sir John accepted the bill, and by reason thereof, according to the custom of merchants, became liable to pay, &c., and being so liable, he promised to pay the said 200*l.* to the plaintiff, Murray, &c. The defendant, Ereskine, let judgment go against him by default, and after execution of a writ of inquiry, and final judgment against him, brought this writ of error.

The first exception taken by the counsel or the plaintiff in error was, that it was not alledged that the bill was drawn according to the custom of merchants.

But to this it was answered by the counsel for the defendant in error, and so resolved by the Court, that the law takes notice of the custom of merchants, without setting it out specially; and if the bill as set out in the declaration appeared to be within the custom of merchants, it was sufficient. Besides after setting out the bill and acceptance, it is said, by reason whereof, "according to the custom of merchants, the defendant below became liable;" which they held was sufficient.

* And from the observations of the Court, in *Brown v. Hanoden*, 4 T. R. 155, it may be inferred, that in declaring upon a promissory note, it is not necessary, though usual, to state that "the defendant became liable to pay the amount by force of the statute;" and where the note is made abroad, we have seen (*ante*, 285.) that an allegation that the instrument was made pursuant to the stat. of Anne, would be improper.

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(d 1) *Allegation of signature, and describing the names of the parties.*

1. GORDON v. AUSTIN. E. T. 1792. K. B. 4 T. R. 611.

Action on a promissory note, made by three partners, and signed with their surnames only, two of whom are stated in the declaration to be outlawed, by the names of *Robert Strobell* and *William Shuliff*. On the general issue, the note was given in evidence, and it was proved that the partnership consisted of W. A., the defendant, W. S., and Daniel Strowbell, not *Robert*. The Court thought that the evidence did not support the contract declared upon, and that the plaintiff should be nonsuited.

2. WHITWELL v. BENNETT. M. T. 1803. C. P. 3 B. & P. 599.

A declaration in *assumpsit* on a bill of exchange stated that the bill was drawn by one John Crouch, on. &c. On production of the bill at the trial, it appeared that it was drawn by one John Couch; and it being objected that the proof differed materially from the declaration, the Court held it a variance.

3. DICKINSON v. BOWES. T. T. 1812. K. B. 16 East. 110.

Declaration against *Thomas Kay* and others, as the joint makers of a note. *Thomas Kay* suffered judgment by default, and the note was proved to have been signed by J. Hodgson, for Rows, J. Hodgson, Ray, and Co.; and the real name of the partner was *John Key*. It was objected, that *Thomas Kay*, the party sued, was not a partner; but proof being given, that *John Key* was the party intended to be sued, and had been actually served with process, and was a partner with the other defendants, the variance in the names was holden to be immaterial, the pronunciation of the latter being *idem sonans*.

4. WILLIS v. BARRETT. H. T. 1816. K. B. N. P. 2 Stark. 29.

Action on a promissory note. It appeared that the amount was made payable to *Elizabeth Willisen*, and the action was brought by *Elizabeth Willis*. Lord Ellenborough, C. J. allowed the plaintiff to adduce evidence to show that *Willisen* was inserted by mistake for *Willis*, who was the person really intended.

5. BASS v. CLIVE. E. T. 1815. K. B. 4 M. & S. 13; S. C. 4 Campb. 78.

A bill of exchange was drawn in this form; "Pay to our order," &c.; signed in the name of *two persons and Co.*, and accepted by the defendant. The plaintiff, as indorsee, in an action against the acceptor, declared upon it as a bill drawn by an aggregate firm. It was proved at the trial that the firm consisted of only one person; it was therefore objected, that there was a variance. Plaintiff was nonsuited; but a rule *nisi* now came before the Court for a new trial. *Per Cur.* The words "pay to our order" naturally import a plurality of persons, and the plaintiff would have violated the letter if he had described it in the singular. On the other hand, it is evident that the acceptor, by accepting a bill drawn upon him in the name of an aggregate firm, is bound to know whether the firm consists of a plurality of persons or not; and if he does accept the bill, he is precluded from saying that the word "our" is not well applied, when he himself has accredited the description by accepting it when so drawn; whereas, on the other hand, it is impossible to suppose that the indorsee of a bill has any other knowledge of the firm of the drawers beyond that which the bill conveys to him. Possibly the plaintiff might have declared according to the fact as it exists, but he may also declare according to the fact as the defendant says it exists—Rule absolute.

6. SIFFEIN v. WALKER AND ROWLESTONE. M. T. 1809. N. P. 2 Camp. 307.

Declaration on the following promissory note:

"— months after date I promise to pay plaintiff, or order, —, value received.
THOS WALKER."

The declaration averred that defendants made their certain promissory note,

† An allegation that the bill was subscribed by the proper hand of the drawer, must, it seems be supported by evidence of his handwriting; see 2 Camp. 305. A variance as to the names of parties is fatal, where the allegation operates as a description of the bill; but otherwise, as it seems, where it merely relates to the names of the parties, to the action, who might have pleaded the misnomer in abatement, provided the identity be proved; see 3 Camp. 29.

Where an allegation as to names operates as a description of the bill, a variance is fatal.

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As where a bill of exchange was declared on as drawn by "J. Crouch," and the drawing was proved to have been by "J. Couch."

But proof of the identity of the parties renders the variance immaterial. Therefore a plaintiff may show that he was the intended payee, which purports to be payable to a person of a different name.

If a bill of exchange purport to be drawn by a firm, consisting of several persons, in an action by the indorsee against the acceptor, the declaration may aver that certain persons using that firm drew the bill, although in point of fact the firm consisted of a sin

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gle individual.

The separate promissory note of A. cannot be declared upon as the joint note of A. and B., although given to secure a debt, and on which both were liable

But a bill drawn upon, and accepted by, two persons may be declared on as drawn and accepted by one,* whether the other be alive,

Or dead.

[515]

Where a declaration averred that the plaintiff was appointed payee of a bill of exchange drawn in blank in Jamaica, and remitted to England by the hand of a third party, the Court held that the appointment should be proved.

&c. Plaintiff's counsel stated that defendants were jointly indebted to plaintiff on a charter-party, and that Walker gave the note in satisfaction of the joint debt. Lord Ellenborough said, it is impossible to say this is a joint promissory note; the name of Rowlestone does not appear in any way connected with it; the import of the bill must be ascertained from the terms of the bill. I must therefore treat this as a separate security for a joint debt; the proper remedy against defendants would be on the charter party.—Plaintiff nonsuited.

7. *EVANS v. LEWIS*. E. T. 1794. Ex. MSS. 1 Williams's Saunders. 291. d. n. This was an action against defendant as drawer of a bill of exchange. On *non-assumpsit* pleaded, it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly. It was objected, that there was a variance between the bill proved and the bill declared upon, and the judge inclined to that opinion, but permitted the cause to proceed, with liberty for the defendant to move for a new trial. A verdict being found for the plaintiff, a rule was obtained to show cause why it should not be set aside. On showing cause, the Court were clearly of opinion that there was no variance between the bill of exchange proved and that which was declared upon; but the defendant should have pleaded in abatement, that another person drew the bill jointly with the defendant, who is still alive; and that the case fell directly within the reason and authority of Whelpdale's case, 5 Rep. 119; 1 Saund. 291. Cabell v. Vaughan; 5 Eurr. 2611. Rice v. Shute; 2 Blac. 947. Abbott v. Smith; Cowp. 832. Ree v. Abbott.—Rule discharged.

8. *MOUNTSTEPHEN v. BROOKE*. H. T. 1818. K. B. 1 B. & A. 224.

In an action against three, as acceptors of a bill, the declaration stated that A. B. made his bill directed to defendants, and thereby requested them to pay, &c. It appeared in evidence that it was in fact directed to them, and one C. D., since deceased, with whom they were in partnership, and that it was accepted by him and them. Lord Ellenborough thought this a variance, and nonsuited the plaintiff; but on application for a new trial, and the citation of the case of *Evans v. Lewis*. E. T. 1794, 1 William's Saunders, 291. d. n., the Court held that there was no variance; and observed: the plaintiff has stated enough to charge the persons sought to be charged in this form of action. It is sufficient for him that the bill was drawn upon and accepted by the three defendants; and by proving that, he satisfies the description stated in his declaration.—Rule absolute.

9. *CRUTCHLEY v. MANN*. M. T. 1813. C. P. 1 Marsh. 29; S. C. 5 Taunt. 529.

One of the counts in a declaration of a bill of exchange stated it to have been drawn by one A. on the defendant, payable to — (inuendo, such person as the drawer should afterwards make payee) and averred an appointment of the plaintiff as payee by the drawer, and acceptance by the defendant. It was proved that the bill, which had been stamped in Jamaica, was drawn on the defendant, with a blank for the payee's name, which had been supplied by the plaintiff with his own name. The only evidence to prove the defendant's acceptance, which did not appear on the bill, was a letter addressed by him, but it did not appear to whom, by which he regretted he had not honoured A.'s bill, and concluded by saying, that on a representation he should pay respect to it. It was not proved by what means the plaintiff obtained possession of the bill. The jury found for the plaintiff, reserving for the opinion of the Court a question whether the bill was so altered by the insertion of the plaintiff's name without showing an authority for the same, as to render it a new bill. On a rule nisi for that purpose, the Court were of opinion that it was incumbent on the plaintiff to have proved that he was entitled to insert his name as the drawer might injure the defendant by contesting the identity

* But a declaration, alleging a note to have been made by A. & B. is supported by evidence of a note given by A. alone, he having prefixed to his signature *for A. and B.*; see 1 Camp. 403. An allegation that a bill is payable to A. is proved by a bill payable to the order of A; *Smith v. Maclare*, 5 East. 476. *abridged post.*

of the bill declared on with that delivered by him.—Rule absolute.

(e 1) *Describing the time for which the bill is drawn.*

1. **BUCKLEY V. CAMBELL.** H. T. 1708. K. B. 1 Salk. 131. S. P. **SMART V. DEAN.** E. T. 1754. K. B. 3 Keb. 645.

The plaintiff declared upon a bill of exchange, drawn at Amsterdam, payable at London, at two *usances*. The declaration did not state the length of such *usances*; and for account of that omission, judgment was given for the defendant, as the Court could not take judicial notice of foreign *usances*, which vary, being longer at one place than another. See Bayl. 184-5.

2. **SMART V. DEAN.** E. T. 1754. K. B. 3 Keb. 645.

Declaration against the acceptor of a bill, dated Paris. After pleading payment, the defendant objected that no time appeared when the bill was payable, being only at double *usance*, the declaration omitting to alledge that double *usance* signifies two months; *sed non allocatur*, it being a term well known among merchants that *usance* is a month; double, two months; and it being averred he had not paid in two months, is well enough. Judgment for the plaintiff, the defendant having waived the right to take advantage of the omission by pleading payment. But by Twinden, J., had the objection been raised by demurrer, the objection would have been maintainable.

(f 1) *Describing the amount for which it is drawn.*

1. **KEARNEY V. KING.** H. T. 1819. K. B. 2 B. & A. 301; S. C. 1 Chit. Rep. 28. S. P. **SPROWLE V. LEGGE.** M. T. 1822. K. B. 1 B. & C. 16; S. C. 2 D. & R. 15 n.; 1 Stark. 156.

In an action against the acceptor of a bill, the declaration stated that A. B. at Dublin, to wit, at London, drew a bill on defendant, requiring him to pay the sum of 542l. 1s. 8d. The bill, when produced, appeared to be drawn in Ireland, and to be payable in Ireland; and though it was for 542l. 1s. 8d. sterling, that sum Irish was only equal to 500l. 7s. 9d. English; and on rule nisi for a nonsuit, and cause shown, the Court observed, the true objection here is, that the declaration imports a bill for money, generally, without stating where the bill is to be paid, whereas the bill in reality is for Irish, and not for sterling money. It may be true, that it is stated that the bill is drawn at Dublin, but it does not follow from thence that Duhlin is in Ireland. The money stated in the declaration is *prima facie* 542l. 1s. 8d. English money. The materiality of the averment that this was Irish currency is quite obvious, considering the difference between the currency of the two countries. And although the bill may be set out in its very words, still the legal operation is different from the words; and it is an invariable rule, that in framing the declaration, the *substantive legal operation* must be stated, and not the words. Now the bill in the declaration is, in *substance and legal operation*, a bill for so much English money; and the bill, when produced, appears to be for the same amount Irish currency. In other words, defendant promised to pay, not the bill set out in the pleadings, but another, one-twelfth less in amount. There is, therefore, a fatal variance between the declaration and the proof. See 2 Jack. 557; Comb. 430; 1 Str. 469; 1 H. Bl. 356; 7 Ld. Raym. 1379; 1 Stark. 69; 4 T. R. 314; 1 Marsh. 215; 1 Wils. 188.

2. **GLOSSOP V. JACOB.** T. T. 1815. N. P. 1 Stark. 69. **LEASEY V. KERRY.** H. T. 1819. K. B. 2 B. & A. 301. S. C. 1 Chit. Rep. 28.

The defendant in this case stated the bill to be given for the payment of 100l. omitting the word *sterling*. Lord Ellenborough held the variance immaterial.

3. **ANON.** E. T. 1702. K. B. 3 Salk. 70.

A bill of exchange was drawn on W. R., for 40l., payable to O. W., or order. W. R. accepts the bill; and afterwards O. W., the drawer, indorses

* The usual averment is as follows: "And the said plaintiff in fact saith, that an *usance* mentioned in any bill of exchange drawn at London, payable at Lisbon, is, and at the several times aforesaid was, three months from the date of the said bill, to wit, at, &c."

† But where the variance arises in consequence of any artifice in framing the bill, as by the introduction of some words in small characters, or by the use of illegible marks, for the purpose of deceit, the variance is immaterial; Allan v. Mawson, 4 Campb. 115; see 1 Campb. 402.

where brought for part of the money stated on the bill.

part of it to the plaintiff, who brought an action against the acceptor. Adjudged that it would not lie, because, by his accepting the bill, he made himself liable only to one action for the whole, and not to several actions for part of the money.

4 ASHFORD V. HAND. E. T. 1739. K. B. And 370.

Although indorsee of a note, payable by instalments, may, before the last day of payment, declare for the part that has become due.

Indorsee against maker of a note for the payment of 5*l.* 5*s.* by instalments; the last day not having arrived, the declaration was only for the part actually due. It was contended, on a motion in arrest of judgment, that the actions could not be sustained, till all the days of payment are arrived, because it is an entire contract for the entire sum, though it be to be paid at different times; and what shows this to be an entire contract is, that the plaintiff, as indorsee, can declare only on the note; Owen. 42; Co. Lit. 292. b. And though it may be said that this action sounds in damages, yet the least variance from the note would be fatal. The plaintiff ought to have counted for the whole money; Cro. Jac. 505. It was answered, and so it was resolved, 1*st.* That though in the case of an entire contract, an action cannot be brought till all the days are past, yet where the action sounds in damages (which is the present case,) the plaintiff may sue in order to recover damages for every default made in payment; and so is Co. Lit. 292. b. 2*d.* It is unreasonable that an action must be brought for money not due; and the case in Cro. Jac. 505. is a very extraordinary one; but it does not prove this declaration to be improper. The motion was, therefore, denied.

(*g* 1) *Describing that the bill was for value received.*

1. GRANT V. DA COSTA. H. T. 1815. K. B. 3 M. & S. 351.

A bill of exchange, "payable to A. or order, value received," may be alleged in a declaration to be a bill [518] for value received by the drawer.*

In an action against the acceptor on a bill, payable to J. S., or order, it was stated to be for value received by the drawer. On production, it appeared to be for value received generally; and on a rule nisi for a nonsuit, the Court held that the meaning of value received on such a bill, payable to a third person, was, that the value had been received by the drawer of the payee; that it was natural the drawer should give the drawee that information; but why should he tell him that he, the drawee, had had value from the drawer; and yet that could be the only other object of the words.—Rule discharged. See *Ld. Raym.* 1481; *Fort.* 282; 8 *Mod.* 267; 1 *Barnard.* 88; *Lutw.* 889; 1 *Mod. Ent.* 310; 1 *Show* 497; *White v. Sedwick, Bayley on Bills*, 4*th* edit. 34.

Secus, if payable to the drawer's order.

2. HIGHMORE V. PRIMROSE. E. T. 1816. K. B. 5 M. & S. 65; S. C. 2 Chit. Rep. 339.

The plaintiff declared on a promissory note given to him by defendant, and alleged, that before the note was given it was agreed between them, that if the defendant should buy of the plaintiff all the malt expended in his

A bill, payable to the drawer's order was for value received generally. The declaration stated that it was for value received by the drawer. The Court thought, that value received by the drawer could be no foundation for his drawing to his own order; but that the fair import of the language was, that in calling upon the drawee to pay to his order, he intended to put the drawee in mind of the duty which he owed from having received value from it; and they considered this a variance; but there being an acknowledgment of the debt by the defendant, the plaintiff recovered on the account stated.

3. CORNISH V. BOLITHO. E. T. 1739. C. P. Willes. 145.

"Case. The first count is on a promissory note for 7*l.* 10*s.*, dated and signed by the defendant, payable to the plaintiff, or order, on demand for value received. The second count stated, that before the signing of the note last mentioned, it was then and there agreed by and between the plaintiff and the defendant, that in case the said defendant should buy the malt expended in his dwelling-house for the three years next ensuing of the plaintiff, then the note last mentioned was to be void; and the said plaintiff was to serve the defendant in the same manner as the rest of the customers of the plaintiff; and the plaintiff avers, that since the making of the said note, the defendant hath expended great quantities, to wit, 100 quarters of malt in his dwelling-house, and

* So where the allegation was that the bill was for value received in leather, and the evidence was that it was for value delivered in leather, it was held to be no variance; see *Bayley*. 46. n; 2 *Campb.* 305.

that the said defendant did not buy the said malt so expended, or any part thereof, of the said plaintiff, but neglected so to do. The defendant to the first, pleaded the general issue; and demurs to the second; and assigns for cause, that the plaintiff had not shown in his declaration that he, from the time of making the said agreement, did use and exercise the trade of a malster, and was ready and willing to sell and deliver to the said defendant such malt as he, the said defendant, expended in his dwelling-house, from the time of making the said agreement until the day of obtaining the original writ. The counsel for the defendant agreed, that in the case of mutual promises, there is no occasion for an averment of mutual performances, as is held in 1 Saund 320; 1 Lev. 274; and the case of Blackwell v. Nash. vide. 8 Mod. 106; and 1 Str. 535; M. T. 9 Geo. 1. B. R.; but he insisted this was part of the agreement, and the only consideration that appeared for the note; and that therefore the plaintiff ought to have averred that he was ready and willing to have performed so much of the agreement as was necessary to be done on his part, and that the defendant refused to perform his part of the agreement, and for this purpose he cited Lamb's case, 5 Co. 23. b.; 3 Lev. 319. Keech v. Knight and 1 Lutw. 490. He likewise insisted that the plaintiff ought to have averred that it was the same dwelling-house that the defendant lived in at the time of the agreement; and for this he cited Cro. Jac. 235. For the plaintiff it was contended, that all the cases were distinguishable from this; for that here the agreement is no part of the note, and the action is founded merely on the note; the rest, therefore ought to be rejected as surplusage, or at most, the agreement can be considered only as a defeasance; and therefore, if the defendant will take any advantage of it, he must show the performance on his part; and of this opinion were the whole Court; and to the other objection, to which the answer was given by Draper, I answered that the averment is as certain as the agreement, for it does not mention any particular dwelling-house."

(h 1) *As to delivery.*

1. SMITH v. M'CLURE. M. T. 1804. K. B. 5 East. 476; S. C. 2 Smith. 43 S. P. CHURCHILL v. GARDNER. E. T. 1798. K. B. 7 T. R. 596.

An action was brought against the acceptor of a bill payable to the plaintiff's own order, and the declaration alleged a delivery of the bill to the defendant, which he afterwards accepted. On special demurrer, because it was not alleged that the defendant ever redelivered the bill to the plaintiff, the Court were of opinion that there was not any ground for the objection; for the acceptance of the bill vested a right in the drawer to sue upon it; and if, after acceptance, the acceptor improperly detained the bill in his hands, the drawer might nevertheless sue him on it; and give him notice to produce the bill, or on his default give parol evidence of it.—Judgment for plaintiff.

See 12 Mod. 125; Cunningham's Law of Bills of Exchange, 66.

2. VAUSANEAU v. BURT. M. T. 1821. K. B. 5 B. & A. 42.

The declaration in this case stated that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c. and then averred that plaintiff did assign the bill. It appeared that it had been agreed between the plaintiff and defendant, that the plaintiff should give up the bill to the defendant, for the purposes of some arbitration; the latter, however, paying over the proceeds of the bill to the plaintiff, and that in pursuance of such agreement, the plaintiff by deed assigned to the defendant the bill and all sums of money due thereon, to and for the defendant's own use, and the defendant covenanted to pay to the plaintiff a sum equal in amount to any money he should receive on account of the bill. Under these circumstances the question which now came before the Court, was, whether there was any proof of the averment in the declaration that the plaintiff had assigned the bill to the defendant. *Per Cur.* The words used in the declaration import, that the plaintiff was to execute an unqualified and unconditional assignment, for the sole benefit of the assignee. Now, looking at the case the real bargain seems to be, that the bill was merely given up to the defendant, who wanted it for a

dwelling-house for three years, the note should be void, averring that the defendant had expended a certain quantity of malt, &c., but had not bought it of the plaintiff, held good on demurrer, because the note form [519] ed no part of the agreement, or at the most that the agreement must be considered only as a defeasance, and then if the defendant would take advantage of it, he should show performance on his part. If it be stated that the bill was delivered to the drawer and that he accepted it, it is not necessary to allege that he delivered it back. Where the declaration stated the consideration of the promise to be an unqualified assignment of a bill of exchange, and the evidence only

showed that the bill was agreed to be delivered up to the defendant for a particular purpose, held that it was a material variance in stating the consideration.

The declaration need not state that the note was signed by the defendant;

Or that the acceptance of a bill was in writing.

[521]
Formerly, if an acceptance were unnecessarily laid in the declaration, it must have been proved as laid.*

If a conditional acceptance of a bill be declared upon it must be set forth specially, with an averment that the condition has been performed.

particular purpose, upon condition that the proceeds should from time to time be paid to the plaintiff, which cannot be said to be an unqualified assignment. On the contrary, it is a conditional contract, and is so described in the indenture executed between the parties themselves in pursuance of their agreement. As the assignee was, therefore, to derive no benefit, we must give judgment for defendant.

(i 1) *As to the making and acceptance.*

1. SMITH V. JARVES AND ANOTHER. T. T. 1727. K. B. 2 Lord Raym. 1484.

In an action on the case brought by the plaintiff as indorsee of a promissory note, against the defendants, the plaintiff declared that on the 28th of February, 1725. and long before and continually afterwards hitherto, the defendants were partners in the way of merchandising and jointly trading for their common advantage, and that on the said 28th day of February, 1725, at, &c. the said William, for himself and the said James his partner, made his promissory note in writing with his own hand subscribed according to the stat. &c. bearing date the said day and year, and delivered it then and there to one P. R. by which note the said William for himself, and the said James, promised to pay to the said P. or order seven months after date of the said note 36l. 5s. for value received, &c. To this count (there being several other counts in the declaration, to which the defendants pleaded *non assumpsit*) the defendants demurred generally. And the defendants' counsel insisted, that this note was not a negotiable note, nor indorsable to the plaintiff within stat. 3 & 4 Ann. c. 9, because the plaintiff had not charged in the declaration that the defendant William had signed the note for him and the other defendant, James, his partner. *Per Cur.* It is very good; for the plaintiff has said, the defendant William made it for himself and his partner, and subscribed it with his own hand, whereby he promised for himself and partner to pay, which shows sufficiently he signed it for himself and partner. And judgment was given for the plaintiff.

2. ERESKINE V. MURRAY. M. T. 1729. K. B. 2 Stra. 817.

Assumpsit upon a bill of exchange against the acceptor; the declaration alleged generally *quod acceptavit*. On demurrer to the declaration, exception was taken that by the stat. 3 Ann. c. 9. the acceptance must be in writing, and that that fact ought to have been distinctly alleged. *Sed per Cur.* *Acceptavit* is enough, and if writing is necessary it will be implied. The plaintiff must have judgment.

3. JONES V. MORGAN. T. T. 1810. K. B. N. P. 2 Campb. 473.

In an action on a bill of exchange, drawn on Burt by the defendants, payable to their own order, and indorsed by them to the plaintiff; the declaration unnecessarily stated an acceptance by Burt. And Lord Ellenborough, C. J. was of opinion that the plaintiff having stated an acceptance, was bound to prove it.

4. RALLI V. SARELL. London Adjourned Sittings after T. T. 1822. 1 D. & R. N. P. C. 33.

An instrument directing the party to whom addressed to pay money on a specified account, but subject to deductions in the event of two contingencies, and accepted and confirmed by the party, was declared upon as a bill of exchange. There was no averment of the performance of the conditions, upon which the acceptance was given. Abbott, C. J. said, As there is no averment of a special acceptance, and the performance of the condition on which the acceptance was given, and as the instrument is not payable at all

* But now a different rule holds; for in *Tanner v. Bean*, 4 B. & C. 312. it was holden, that where an averment of acceptance was unnecessary, the plaintiff was not bound to prove it. When a note is made, or a bill accepted, by an agent, it may be described as made by the party himself; 2 Campb. 604. And in suing upon a joint and several note, the parties may be sued jointly or separately; and if sued separately the note may, in a second count, be stated as made by the defendant alone; see ante; for where a contract is joint and several in an action against one, it is not necessary to notice the other; 4 Campb. 34; 5 Co. 119 b.; 1 B. & A. 224.

events, it cannot be declared upon as a bill of exchange. See 4 Campb. 176; 1 Marsh. 176.

5. FORMAN v. JACOB. T. T. 1815. N. P. 1 Star. 46.

Action by indorsee against acceptor of a bill of exchange; the declaration stated the date of the acceptance, and presentment for payment on a particular day after its maturity. It appeared in evidence that the bill was neither accepted nor presented on the particular day mentioned in the declaration. It was therefore insisted that the variances were fatal, but Lord Ellenborough thought, with respect to the acceptor, that when the bill became due and payable, was the same as after the bill became due and payable, and that consequently if it appeared the bill was presented after it became due, it was sufficient.—Verdict for plaintiff.

(j 1) *As to direction.*

GRAY v. MILNER. H. T. 1818. K. B. N. P. 2 Stark. 336; S. C. 3 Moore. 90.

Action of *assumpsit* against the acceptor of a bill of exchange; the declaration stated that the bill was directed to the defendant; and that he thereby requested, &c. On the bill being produced, it appeared that it had been drawn by W. and payable to his own order, at 1, Wilmot-street, but no direction to the defendant. Lord Ellenborough, C. J. held this a fatal misdescription, and nonsuited the plaintiff.

(k 1) *Stating the place where the bill or note is made payable,† and of its presentment for payment.*

1. GILES v. BOUNE. H. T. 1817. K. B. 2 Chit. Rep. 300.

The declaration on a bill of exchange, payable at Messrs. A. and B. averred that it was presented there, and not paid. It was not said that it was presented to A. and B. and that it was not paid by the defendant or any person on his behalf. Per Lord Ellenborough. It was not necessary that the declaration should allege that the bill was not paid by A. and B. If it had been paid at the place it was made payable by any other person, it would have been in fact paid by the defendant.—Judgment for plaintiff.

2. BYNNER v. RUSSELL. T. T. 1822. C. P. 7 Moore. 266; S. C. 1 Bing. 23.

In an action on a bill of exchange, the declaration stated, that “when the said bill became due and payable, according to the tenor and effect thereof, to wit, on the 31st day of March, in the year, &c. at, &c. the said bill of exchange was, in due manner, and according, &c. presented and shown for payment. Demurrer, that the day on which the presentment was stated to have been made, was a Sunday. *Per Cur.* It would have been sufficient to have stated a presentment according, &c. when the bill became due, as the day would appear on inspection of the bill; this is not altered by the introduction of a day certain, as it is specified under a *scilicet*; in all which cases the precise day is not material, and need not be proved.—Judgment for plaintiff. See 1 Taunt. 131; 3 B. & C. 232.

* And it is in all cases better to omit the statement usually inserted in the printed forms, that the plaintiff *directed the bill* to the defendant; see 3 Moore. 91. in which a count stating that the drawer made his bill, by which he required two months after the date thereof, the payment to himself or order, of the sum of 30l, 2s. or omitting the name of the defendant, but alleging that the defendant accepted the bill, was holden valid.

† The rules connected with this subject having been already stated, it is only necessary here to notice, that if an acceptance import to make a bill of exchange payable at a particular place, this need not be stated in the declaration, unless the acceptance is prior to the 1st August, 1821, or unless it expresses that the party accepts the bill payable there, and not otherwise or elsewhere. If this be expressed in the acceptance, or if the acceptance be prior to the 1st August, 1821, the acceptance must be stated as a special acceptance to pay at the specified place; see ante div. Presentment for Payment.

A promissory note not being within the 1 & 2 Geo 4. c. 78. it is still necessary, in declaring upon those instruments, where they are made payable at a particular place, in the body of them, to insert a special count, setting out the contract without a qualified form; 3 Camp. 247; 4 id. 201; 14 East. 501; 5 Taunt. 30; 3 M. & S. 152; and although it has been decided, that if the place of payment is mentioned only at the foot of the note; 4 Campb. 200: it may be treated as an unqualified engagement, yet it is usual in practice, and always advisable, to describe the note in one count, according to its qualified nature.

In an action against the acceptor of a bill of exchange, if the declaration aver presentment and acceptance on particular days, a variance in such dates is immaterial, if it appear it was presented for payment when it became due.

[522] If a bill be not directed to the defendant, it should not be so described.* A declaration on a bill, payable at A. B.'s, averring a presentment at A. B.'s, but not stating it was shown to A. B. himself, is good.

Where a declaration on a bill of exchange averred that when the said bill became due, to wit, “on, &c.” which was a Sunday, the same, was, according to the tenor and effect, presented, &c., the Court held it good on special demurrer.

[523]

The allegation that the maker of the note payable at a particular place had notice of its dishonour is immaterial, and need not be proved.* Stating that the defendant had not paid at or after the day of payment, &c. is good.

The want of an averment in a declaration on a foreign bill, second and third not paid, is aided after verdict; Or judgment by default.

[524] The insertion of the common counts in the declaration will prevent a nonsuit for want of a stamp, where there is a privity between the plaintiff and defendant, and the consideration can be proved.†

3. PEARSE v. PEMBERTHY. T. T. 1812. 3 Campb. 261.

Assumpsit against the maker of a note, payable to W. B. and Co.'s; the place of payment being a material part of the instrument, it was urged that the defendant should have had notice of the note's dishonour; for the answer, being "not sufficient effects," showed there were some effects then. Lord Ellenborough thought the proof of notice unnecessary.—Verdict for plaintiff.

(11) *Stating a breach of the contract to pay.*

1. HILLMAN v. LAW. M. T. 1685. K. B. 2 Show. 437. MANNE v. CAREY. M. T. 1696. 1 Lutw. 103.

Action on the case on a bill of exchange, brought against the acceptor by the plaintiff, as administrator to the party to whom the bill was payable, on the custom of merchants; and breach assigned, *præd iamen*, the defendant *ad vel post præd. diem*, the day of payment, *non solvit nec aliquantulum pro eisdem hucusque contentavit*. Demurrer to the declaration, because he did not say *non solvit* at or before the day; and a payment before the day is a payment at the day. But held good *per Curiam*, because said *hucusque non*, &c.—Judgment for the plaintiff.

2. EAST v. ESSINGTON. M. T. 1701. K. B. 1 Salk. 130. S. C. 2 Ld. Raym. 810. WEGERSLOPE v. KEENE. M. T. 1719. 1 Stra. 214.

Declaration on a foreign bill requesting the drawee to pay this the drawee's first bill of exchange, the second and third not being paid. On *assumpsit*, and a verdict for plaintiff, it was objected in arrest of judgment, that there was no averment that the second and third bill was not paid, which, it was contended, must be deemed a condition precedent. *Sed per Cur.* After verdict, that must be intended.

3. STARKE v. CHEESMAN. H. T. 1699. K. B. Carth. 509.

An objection similar to the one in East v. Essington, *supra*, was taken in this case, upon a motion in arrest of judgment, after judgment by default; but the Court said, that the allegation that the money on the bills was not paid, the amount being the same in all of them, supplied the want of such an averment.

4. *Of the common counts.*†

1. ALVES v. HODGSON. E. T. 1797. K. B. 7 T. R. 341. S. P. TYTE v. JONES. abridged, *ante*, 305. WADE BEASLEY. E. T. 1801. N. P. 4 Esp. 7. WILSON v. KENNEDY. M. T. 1794. N. P. 1 Esp. 245.

Declaration upon a note made in Jamaica. On the document being produced at the trial, it appeared that it was not stamped according to the laws of that colony. A verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit. An application for that purpose being made, Lord Kenyon said, there is a count on a *quantum meruit* in the declaration, which was not considered at the trial; and as the instrument could not be given in evidence for want of a stamp, there must be a new trial, in order to give the plaintiff an opportunity of recovering on the general count; therefore, let there be a new trial.

2. DANGERFIELD v. WILBY. E. T. 1802. N. P. 4 Esp. 159.

* As to the presentment of a bill at a particular place, see *ante* div. Presentment for Payment.

† The cases already abridged, *ante*, have sufficiently shown that where there is a privity between the party suing and being sued, the former may recover the consideration passing between him and the latter; it is in such cases, therefore, prudent, and always adopted in practice, to insert counts in the declaration applicable to such consideration; but where there is no privity existing between the plaintiff and defendant, and no express promise to pay the amount can be proved, or where the party is discharged by an alteration in the bill or note, or by the laches of the holder, the plaintiff will be precluded from recovering on the common counts.

‡ Or the fatal consequences of a variance may be avoided by the introduction of such counts, for an acceptance is an appropriation of the money specified in the instrument to the use of the payee or holder; it is in effect an acknowledgment by the acceptor that he has received from the drawer such a sum on account of the holder; see 3 T. R. 182; or in an action against the maker of a note, the note itself is evidence as between the payee and maker of money lent, and is admissible as a paper or writing to prove the defendant's receipt of so much money from the plaintiff.

The declaration contained a count upon a note made by the defendant payable to the plaintiff, and the money counts. At the trial the note was stated to be lost, but no evidence of the fact was offered. It was proved, however, that on the money being demanded, the defendant had apologised for not having paid money on account of the note. This was the whole of the plaintiff's case; and he contended that the note was only evidence of the consideration (which was stated to have been money lent,) and that he might abandon the note, and go for the consideration. But Lord Ellenborough said, that as the note, for any thing that appeared in evidence, was in existence, it might be still in circulation, so that the defendant might be subjected twice to the payment of the same demand, and without therefore proving the note lost, the plaintiff was not entitled to recover. Nonsuit.

stroyed, before he can resort to the general counts.

3. HIGHMORE v. PRIMROSE. E. T. 1815. K. B. 5 M. & S. 65.

In an action against the acceptor of a bill, plaintiff is precluded from recovering on the special count, because of a variance; but he proved that defendant had acknowledged the acceptance, and pleaded inability to pay; upon the point reserved, the Court held, this entitled plaintiff to a verdict on the count for the account stated, and he had judgment accordingly.

4. WELLS v. GIRLING. H. T. 1819. C. P. 8 Taunt. 737; S. C. 3 Moore. 79; S. C. not S. P. 4. Moore. 78; S. C. 1 B. & B. 447.

The plaintiff in this case having failed on his count on a note, endeavoured to resort to the money counts, and offered to give the note in evidence; but it being proved that the defendant put his name to the note, merely as a surety for his co-makers, and that no consideration had passed to him thereon; the Court said, that a *bona fide* debt, on the part of the defendant, was essential to entitle the plaintiff to a remedy on the money counts. A rule *nisi* to enter a non-suit was therefore made absolute.

5. DILLOV v. RIMMER. M. T. 1822. C. P. 7 Moore. 427; S. C. 1 Bing. 100.

It appeared in this case, that the defendant having accepted a bill of exchange, drawn by A. B., the same was indorsed to the plaintiffs, and was dishonoured when due. The defendant being threatened with proceedings by the plaintiffs accepted another bill, drawn by A. B. for the amount of the former bill, and the incident expences, and interest, and executed a warrant of attorney to secure the same sum, and agreed to pay the expenses of the said warrant of attorney. The former bill was retained by the plaintiffs' attorney. The second was, when due, discharged. On the defendant refusing to pay the costs of the warrant of attorney, amounting to 2l. 12s. 6d., the present action was brought on the former bill, and the money counts were found for the above expences. The jury having found generally for the plaintiffs, the defendant's counsel obtained a rule *nisi* to enter the verdict on the money counts under the statute 39 & 40 Geo. 3. 104. s. 12. in order to deprive the plaintiffs of their costs. The Court said, that as the second bill had been satisfied, the present action should not have been brought on the former bill, and they made the rule absolute.

ces of a warrant of attorney, and the first bill was retained by the creditor, who brought an action on it for the expences of the warrant of attorney, adding the money counts, and obtained a general verdict, the Court allowed the verdict to be entered on the money counts, with a suggestion to deprive the plaintiff of his costs.

(f) Of obtaining leave to inspect a copy of a bill or note.

1. ADAMS v. THE DUKE OF GRAFTON. M. T. 1827. Ex. Bunb. 244.

This was an action brought by the indorsee of a promissory note, payable to A., or order; and it was moved before the trial, on behalf of the defendant that the plaintiff might produce the note, and leave it with his attorney, in order to be inspected by the defendant, his attorney, &c. on a suggestion that the note was forged; and it was insisted for the defendant, that since even a bond, upon such motion, might be produced, much more might a note; but it was answered by the counsel for the plaintiff, and by the Court, that though a bond might be produced, being under hand and seal, yet that it was upon this reason, that the plaintiff declares upon it with a *proferet in cur.*; yet there

But to enable the plaintiff to recover where he declares on a bill or note, and does not produce it, he must prove it to have been lost or destroyed.

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An acknowledgement of the debt by the defendant will enable the holder of a bill to recover upon a count for an account stated.

But if a note is made as security, the maker is not liable on the money counts, if the plaintiff fail in consequence of any variance in his account on the note. Where a second bill of exchange was substituted for a first, with an agreement to pay the expen-

The Court has refused an application that the plaintiff should allow a bill or note to be inspected by the defendant.

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to ascertain whether it has

been forged.

is no instance that in this, or such a case, a plaintiff was ever obliged to produce evidence of what is the foundation of his action; and the statute 3 & 4 Anne. cap. 9. makes no difference between these notes and inland bills of exchange, but in the point of pleading; and there is no instance from the statute (which might have often happened that ever such a motion was made or granted; nor before that statute, that ever a bill of exchange was produced upon such motion.

2. *THRELFALL V. WEBSTER*. H. T. 1823. C. P. 7 Moore. 559; S. C. 1 Bing. 161.

And where a rule nisi for the production by the defendant of certain bills of exchange was obtained by the plaintiff, on an affidavit charging fraud generally, the Court discharged the rule.*

A rule nisi was obtained in this cause to show cause why the defendant should not be compelled to produce certain bills of exchange, in order to the plaintiff's inspection of them, and that he might take copies thereof. The affidavit on which the application was grounded, charged, but did not specify, fraud in the defendant's possession of the bills, and alleged that the bills were unsatisfied. Counter affidavits were put in, which directly denied any fraud, and stated that the bills were satisfied. Dallas, C. J. said, that cases of this nature must rest in the discretion of the Court; and that though applications of a like general nature had been granted, to prevent a resort to equity, it was inexpedient to continue the practice. He adverted to the arguments offered for the defendant, that such applications could not succeed where the possession of the bill formed the only defence, and distinguished cases where the interest of the parties was equal, from the present, in which it was adverse. And his opinion was, that as fraud had been generally alleged, and as generally denied, the refutation was equivalent to the charge; and that particular instances of fraud should have been sworn to.—Rule discharged.

(g) *Of the particulars, of demand.*

To enable the plaintiff to avail himself of the common counts his particulars must disclose his intention to resort to them.†

WADE V. BEASLEY. E. T. 1801, N. P. 4 Esp. 7.

This was an action upon a promissory note. The plaintiff in his particulars of demand, had described the action to have been brought for the recovery of the amount of a note for a 100*l.* with the interest. The note had been improperly stamped, and the plaintiff proposed to avail himself of the common counts. But Lord Kenyon ruled, that as the particulars were intended to apprise the opposite party of what he is to come prepared to pay, the plaintiff must be bound by it, or particulars are of no use. His Lordship added, I would assist the plaintiff if I could; but the defendant, having come prepared to meet one demand, must not be called upon to meet another.—Plaintiff nonsuited.

(h) *Of staying proceedings on payment of debt and costs.*

1. *SMITH V. WOODCOCK*. E. T. 1792, K. B. 4 T. R. 691. S. P. *GOLDING V. GRACE*. H. T. 1769. C. P. 2 Bl. Rep. 749.

Proceedings will be stayed against the indorser upon payment of the debt and costs of that action, but against the acceptor only on payment of costs of the several actions.

The holder of a bill of exchange brought separate actions against the acceptor, the drawer and indorsers. The drawer and one of the indorsers moved that all proceedings might be staid against them upon payment of the amount of the bill of costs of these two actions which was opposed on the ground that the costs of the other action should be discharged also. *Sed per Cur.* "That is only necessary when the application for staying the proceedings comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered."

* But in practice it is usual, if a special ground be laid, or that the defendant has no copy of the instrument, or that it has been long over due, or that he has reason to doubt the genuineness of the signature, for the Court on motion, or a judge on summons to make an order for the delivery of a copy of it to the defendant or his attorney, and that all proceedings in the action be in the meantime stayed; but these applications will not be conceded where the intended defence, is one merely of a technical nature, or to enable the defendant to plead in abatement; 2 D. & R. 419; to object to the sufficiency of the stamp, or that the bill or note has been altered.

† Though it has been since holden, that if a bill of particulars specifies the transaction upon which the plaintiff claims to recover, it need not specify the technical description of the right which results to the plaintiff out of the transaction; and Heath, J. said, we must not drive parties to special pleadings to draw their bills of particulars; *Brown v. Hodgson* 4 Taunt. 190. abridged post, "Particulars of Demand."

2. *WINDHAM v. WITHER.* E. T. 1721. K. B. 1 Stra. 515.

The plaintiff had brought separate actions upon a promissory note, against the maker and indorser, and obtained judgment in both. A motion was made that as the defendants had tendered the principal on one and the costs on both, no execution might be issued, which the Court ordered accordingly.

3. *HODGSON, GENT. ONE, &c. v. GUNN.* M. T. 1822. K. B. 2 D. & R. 57.

A rule had been obtained calling upon the plaintiff to show cause why all proceedings in this action should not be stayed, without payment of costs of several other actions, which were depending on the same bill of exchange. It appeared that separate actions had been commenced against all the parties to a bill of exchange, after the defendant, as acceptor, had offered to pay the bill, but not the costs. *Per Cur.* It sometimes comes to the knowledge of the Court, that these actions are brought merely for the sake of increasing the costs. The Court has a discretion, and it will be exercised for the benefit of the acceptor or drawers. The rule for making the acceptor pay all the costs, applies only where the actions are commenced before an offer to pay. —Rule absolute.

costs of other actions brought on the same bill against other parties, does not apply to actions commenced after an offer to pay.*

4. *STEEL v. BRADFIELD.* H. T. 1812. C. P. 4 Taunt. 227.

The note upon which this action was brought had the following memorandum indorsed on it by the plaintiff; "I do hereby agree that if the interest is duly paid, 2*l.* 10*s.* at the end of six months, and 2*l.* 10*s.* on the 25*th* December, during my life, then the note shall be given up." Default was made in one of the half-yearly payments; and on application to stay proceedings upon payment of arrears of interest and costs, the Court said; repeated applications have been made to restrain executions levied, as alleged, contrary to the agreement of the parties; and upon showing cause, it has appeared that there has been a failure in payment of the instalments, and the rules have been discharged. See *Gowlett v. Hanforth*, 2 Bl. Rep. 958; *Leveridge v. Forty* 1 M. & S. 706.

(i) *Pleas.*† See post, tit. Limitations, statute of.

1. *HALL v. SMITH.* E. T. 1823. K. B. 2 D. & R. 584; S. C. 1 B. & C. 407.

This was an action against A. B. as the maker of promissory notes, beginning "I promise to pay," &c., and signed as follows; "For A. B., C. D. and E. F."

Signed "A. B."

A. B. pleaded in abatement the non joinder of C. D. and E. F., who were his co-partners at the time of making the note. To this there was a replication, traversing the plea on which issue was joined. A verdict had been given for the plaintiff, subject to the opinion of the Court as to the several liability of the defendant.

Cases cited for plaintiff. *March v. Ward*, Peake, N. P. C. 130; *Clark v. Blackstock*, Holt. N. P. C. 474; *Galway v. Mathew*, 1 Campb. 403; *Sayer v. Clayton*, 1 Lutw. 696. Cases cited for defendant. *Galway v. Mathew*, 1 Campb. 403. *Per Cur.* The cases of *March v. Ward*, and *Clark v. Blackstock*, decide that where the party uses the pronoun "I," a several obligation is thrown upon all the parties who sign the note; a fortiori, A. B. who is the person actually making the promise is severally liable. *Postea* to the plaintiff See 1 Sh. 76; 2 id. 819; Cowp. 832; 1 Burr. 323; 5 id. 2511; Com. dig. tit. Obligation F. G; 2 Bl. Rep. 947; 1 Saund, 291. b. n. (4) 1 Esp. 134. 2 Cam. 308.

* Or after an acceptor has suffered judgment by default; for in that case, he can only be charged with the costs of the particular action against himself; and if in an action against the acceptor an attachment be obtained against the sheriff for not bringing in the body, the sheriff may be released on payment of the costs, of that suit only; the King v. Sheriff of London, 2 B. & A. 192.

† To actions upon bills and notes, the defendant may plead any matter in discharge that would be available in an action upon any other simple contract, as that the plaintiff is an outlaw, alien enemy, bankrupt, &c. or that the defendant is exempt from being sued, or

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The omission of the words "or promise," in a plea negating the fact, that the defendant undertook to pay a promissory note, is not so fatal as to entitle plaintiff to sign judgment as for want of a plea.

A plea of tender made after the day of payment of a bill of exchange, al

A plea that the defendant gave a bond in discharge of the bill is bad, for it amounts to the general issue.

It is no answer to an action on [530] a bill, that it was given as the consideration of a lease to be executed by the plaintiff, and of letting the defendant in to possession of the premises, and that plaintiff had refused to execute the lease.

2. SMITH v. JONES. M. T. 1823. K. B. 3 D & R. 621.

A plea to *assumpsit* on a promissory note, "that defendant did not undertake," omitting the words "or promise in manner and form," concluded to the country. Plaintiff signed judgment as for want of a plea. On rule nisi obtained to set it aside, the Court held that the plea was not so unintelligible as to authorise the signing of the judgment, but they made the rule absolute without costs.

3. HUME v. PEPLOE. H. T. 1807. K. B. 8 East. 168.

To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that after the expiration of the time appointed for the payment of the bill, and before action brought, he, the defendant, tendered the whole money then due, owing, or payable to the plaintiff, in respect of the bill, with interest from the time of the default in respect of the damages sustained by the plaintiff, by reason of the non-performance of the promise; and that he always, from the time of making the tender, had been and still was ready to pay, &c. On demurrer, the plea was holden bad, Lord Ellenborough, C. J. observing, that in *Giles v. Hartist* (1 Ld. Raym. 254.) it was expressly decided that an averment of *tout temps prius* was necessary in a plea of tender; and that it was one of those landmarks in pleading which ought not to be departed from; that the defendant had been guilty of a neglect in non-payment of money at a certain day, upon which a cause of action had arisen to the plaintiff, and that it was no answer to show that at a day subsequent he was ready to have paid it, unless he were always ready to have paid it from the time it had first become due.—Judgment for plaintiff. See Fort. 376. though before action brought, is not good, notwithstanding it aver that the sum tendered was the whole money then payable to the plaintiff, in respect of the bill with interest.

4. HACKSHAW v. CLERKE. M. T. 1696. K. B. 5 Mod. Rep. 314.

An action on the case was brought upon a bill of exchange, to which the defendant pleaded, that after the acceptance of the bill, he gave a bond in discharge thereof. Upon demurrer to this plea, it was objected, that it amounted to the general issue; for the debt, upon the bill being extinguished by the bond, the defendant ought to have pleaded *non-assumpsit*, to have given the bond in evidence; and the Court seemed of that opinion, but, by consent, the defendant pleaded the general issue.

5. MOGGRIDGE v. JONES. M. T. 1811. K. B. 14 East. 486; S. C. 3 Campb. N. P. C. 38.

A. and B. entered into an agreement for the sale of the lease of a house. B. was let into possession, and accepted a bill for the purchase money. In an action brought by A. against B. for non-payment of the bill, it was holden that B. could not defend the action by proving that A. had refused to execute an assignment of the lease, but that B. must bring a cross action or go into equity for a specific performance. Lord Ellenborough, before whom the cause was tried, observing, that there was originally an ample compensation for the bill, and that it had not completely failed, as the defendant had continued in possession of the premises, and that the sum to be allowed for such failure was matter not of mere calculation, but of unliquidated damages. A verdict was accordingly given for plaintiff. A motion was made for a new trial; but the Court thought the verdict right, and that defendant must resort to his remedy on the agreement, if plaintiff persisted in refusing to execute the lease. Rule refused.

(j) *Judgment by default, and reference to compute.*

1. ANON. H. T. 1770. C. P. 3 Wils. 155; S. C. 2 Blac. 748. by name of that he is discharged by an insolvent act, bankruptcy, award and satisfaction, arbitrement, release, judgment recovered, tender, set-off, &c. The form of the general issue of course depends upon whether the action be debt or *assumpsit*; in the former it should be *nil debt* in the latter *non assumpsit*. As the statute of limitations only operates from the time when the bill or note becomes due, and not from the date. 1 H. Bl. 681; Carth. 2; 1 Taunt. 575; W. Jones 194; Godb. 437; 12 Mod. 444; 2 Stark. 222; post. tit. limitations, statute of; the plea when the instrument is payable after date is, *actio non accrevit* and not, *non assumpsit infra sex annos*; 10 Mod. 294.

SNOWDEN v. THOMAS. S. P. BERRS v. LINDSELL. H. T. 1741. K. B. 2 Stra. 1149.

On a rule to show cause why a writ of inquiry, executed after judgment by default in an action on a note, should not be set aside, because the note was merely produced and not proved; the Court said, upon suffering a judgment by default in an action upon a bill or note, the sum due thereon is admitted, the instrument and need not be proved upon the execution of the writ of inquiry.—Rule discharged.

Suffering judgment by default, admits the validity of the instrument.

2. ELLI v. WALL. T. T. 1746. C. P. Barnes. 234. S. P. BILLERS v. BOWLES. H. T. 1745. C. P. Barnes. 233.

Formerly the mode of ascertaining what was due at default, was by writ of inquiry.

On a rule to show cause why an inquisition taken on a writ of inquiry of damages should not be set aside, for want of plaintiff's proving a promissory note, it was insisted, before the sheriff, that the note was admitted by the defendant's suffering judgment; and the jury found for the sum mentioned in the note, without any proof, which was holden unwarrantable.—Rule absolute.

3. SHEPHERD v. CHARTER. E. T. 1791. K. B. 4 T. R. 275.

In an action on a bill of exchange, the defendant having suffered judgment by default, the plaintiff obtained a rule to show cause why it should not be referred to the master, to compute principal and interest. On showing cause, the rule was opposed, on the ground that the reference in such a case was irregular. *Sed per Cur.* It is the practice, in actions upon bills and notes, to refer it to the master, to see what is due for principal and interest, without executing a writ of inquiry; for the quantum of damages depending on figures, may as well be ascertained before the master, as by the intervention of a jury.—Rule absolute.

But now after judgment by default, in an action on a bill in K. B.;

4. ANDREWS v. BLAKE. M. T. 1790. C. P. 1 H. Fl. 529.

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After judgment by default, in an action on a bill of exchange, the plaintiff obtained a rule to show cause why it should not be referred to the prothonotary to ascertain the principal and interest, and thereby dispense with a writ of inquiry. It was opposed on the ground that the intervention of a jury was necessary in all cases where the debt really due did not appear on the face of the declaration.

Or C. P.;

Sed per Cur. Here the amount appears on the face of the bill, and the interest can be exactly calculated.—Rule absolute.

Or on a note, the Courts will refer it to the master or prothonotary to ascertain what is due for principal, interest, damages, and costs.

RASHLEIGH v. SALMON. T. T. 1789. C. P. 1 H. Bl. 252. S. P. SHEPHERD v. CHARTER. E. T. 1791. K. B. 4 T. R. 275. S. P. LONGMAN v. FENN. H. T. 1791. C. P. 1 H. Fl. 541.

The defendant suffered judgment by default in an action on a promissory note. On application for a rule to show cause why it should not be referred to the prothonotary to ascertain the damages, interests, and costs, the Court made the rule absolute.

6. BIGGS v. STEWART. E. T. 1817 Ex. 4 Price. 134.

On a rule to show cause why, in an action on a promissory note, it should not be referred to the master to compute principal and interest, and why the plaintiff should not sign final judgment without the executing a writ of inquiry, the Court made the rule absolute.

And the Court of Exchequer have adopted the same practice,

7. JARROLD v. ROWE. M. T. 1820. Ex. 8 Price. 592.

An application for a rule to compute interest and costs on a sum recovered by verdict in an action on bills of exchange, was supported by an affidavit that the plaintiff had been delayed by every possible expedient and proceeding for two years and a half, and circumstances were stated which made out a case of unparalleled delay and vexation; by which the plaintiff had been put to an expense in costs to upwards of 1000*l.* However, under these circumstances, delay; the Court refused the rule.

In the absence of vexatious

8. CHILTON v. HARBORN. T. T. 1792. Ex. 1 Anst. 249.

After judgment by default in an action on a bill of exchange, a motion was made that it might be referred to the master to compute principal and interest, instead of going to a writ of inquiry. Upon it being stated to be the practice of the other Courts, the Court granted a rule to show cause, observing, that

Though it formerly did not.

[532] they thought the practice objectionable. After cause shown, the Court said, And where after interlocutory judgment had been signed, the plaintiff died in the same term, the Court suffered a reference to compute. It is certainly desirable that the same practice should prevail in all the courts, and it is the duty of every court to endeavour to keep it so; but here that rule is influenced by another maxim, by which we are held to use the greatest caution in breaking in upon the ancient established practice and rules of the court; therefore it is a sufficient answer to the present application that it is not now the practice of this court, whether this court may chose for the future to alter their practice, is a distinct question.—Rule discharged.

BERGER v. GREEN. H. T. 1813. K. B. 1 M. & S. 229.

Interlocutory judgment in an action on a bill had been signed on the 27th of January. The plaintiff died on the 30th, and a rule to compute principal and interest was obtained on the first of February. It was contended, that as these proceedings had been had within the same term, that a *scire facies* was unnecessary; and that when final judgment was signed, it should relate back to the first day of the term.

In this opinion the Court concurred, and the rule to compute was made absolute.

10. BROWN v. MESSITER. M. T. 1814. K. B. 3 M. & S. 281.

The acceptor of a bill of exchange desired to see the bill; and he admitted the acceptance, and promised payment. He suffered judgment by default; and the bill having been stolen from plaintiff's attorney's pocket, and no findings of it gained, a rule *nisi* to refer it to the master to see what was due for principal and interest upon the said bill; on production of a copy, verified by affidavit of the plaintiff's attorney, and no cause being now shown, the rule was made absolute.

11. OSBORNE v. NOAD. T. T. 1800. K. B. 8 T. R. 681.

The declaration contained only counts for goods sold, and for work and labour done, and the common money counts. On judgment by default, the plaintiff obtained a rule *nisi* to refer it to the master to compute principal and interest on two notes; and in support of the rule, an affidavit was produced, stating that the action was brought to recover the amount of these notes, and that such amount was recoverable under the money counts. The Court however, said that the rule was confined to cases in which it appeared by the declaration that the action was brought on the notes or bills.—Rule discharged.

12. MAUNSELL v. MASSAREENE. M. T. 1792. K. P. 5 T. R. 87.

In an action on a bill of exchange after default, the Court refused to refer it to the master, because it was a bill for 200l. Irish money, on the ground that a jury are the proper judges of the value of this money. See Cro. Jac. 617; Cro. Eliz. 536; 14 East. 622.

13. NAPIER v. SHNEIDER. E. T. 1810, K. B. 12 East. 420.

A bill was drawn in Scotland upon, and accepted by, the defendant in England; and on motion to refer it to the master to compute principal, interests and costs, on this bill, the Court was prayed to direct the master to allow re-exchange; but this they refused, saying, that they would not refer it to the

[533] master to try foreign customs and facts, but only to compute what was due upon the bill itself.

As where the bill was drawn in Scotland and accepted in England, the Court refused to direct the master to compute the re-exchange.

14. NELSON v. SHERIDAN. M. T. 1799. K. B. 8 T. R. 395. S. P. BISHOP v.

BESF. M. T. 1818. K. B. 2 Chit. Rep. 233.

In an action of debt, on a judgment recovered in an action on a bill of exchange, damages 136l. application was made for a rule to show cause why it might not be referred to the master to compute interest on the judgment, and ascertain the damages sustained by the plaintiff, by reason of the detention of the debt, for which this action was brought. But the Court refused the rule, being of opinion, that it was a question for the jury to say whether any damages had been sustained or not.

15. DUPELOX v. JOHNSON. H. T. 1798. K. B. 7 T. R. 473. S. P. HEALD v. JOHNSON. M. T. 1804. K. B. 2 Smith. 46. n.

Assumpsit. The declaration contained many counts, one of which was on a bill; to that there was a demurrer, on which the plaintiff had judgment; to the others there was a plea, on which issue was joined. A rule nisi was obtained to refer it to the master to compute principal and interest, and costs on the bill; and on showing cause against this rule, it was urged that the plaintiff ought either to have waited for the result of the trial of the issue on the other counts or to have entered a *nolle prosequi* as to those counts. In support of the rule, *Flemming v. Langton*, 1 Stra. 532. was cited; and the Court thought that case decisive of the present, and made the rule absolute. See *Tidd's practice*, 569.

the master to ascertain what is due for principal, interest, and costs, in that count, though there are other counts on which the parties are at issue.

16. *POCOCK v. CARPENTER*. T. T. 1814. K. B. 3 M. & S. 109. *GORDON v. CORBETT*. H. T. 1806. K. B. 3 Smith. Rep. 179. *S. P. RUSSEN v. HAYWARD*. E. T. 1822. K. B. 5 B. & A. 752; S. C. 1 D. & R. 444.

Upon a question arising whether a rule could be obtained for referring a bill of exchange to the master to compute principal and interest, on the same day on which judgment had been signed for want of a plea; Lord Ellenborough said, where interlocutory judgment is signed upon demurrer, the plaintiff must wait for his rule until the day following; since, in that case, the day upon which judgment is given is granted by the record to the parties; and it would be incongruous to deprive either of them of a part of the day, after the whole of it has been already granted to them; but where interlocutory judgment is signed for want of a plea, as in the present case, no day is given; and therefore it seems more natural that judgment should be entered immediately. judgment be given upon demurrer, the plaintiff must wait for his rule until the day following.

17. *FARNER v. WOOD*. E. T. 1816. MSS. K. B. 1 Chit. Rep. 466. n. S. P. *LILLERS v. LUPTON*. H. T. 1813. MSS. K. B. *ibid.* S. P. *DAWSON v. SLADFORD*. *ibid.* 468.

Cause was now shown against a rule, which had been obtained to set aside a judgment on a promissory note, on the ground that there had been no service of the rule absolute to compute principal and interest. The Court said, that the rule nisi and the rule absolute to refer to the master must both be served, and thereupon made the rule for setting aside the judgment absolute.

18. *FLINDT v. BIGNELL*. M. T. 1815. K. B. 1 Chit. Rep. 466. n.

It appeared in this case that the service of a rule nisi to compute principal and interest on a bill of exchange, had been made on one of two defendants. *Le Blanc, J.* said, the service is insufficient; it should have been on both of them.

two defendants in an action on a bill, service of a rule to compute principal and interest on one of them will not suffice.

19. *BELAIRS v. POULTNEY*. E. T. 1817. K. B. 1 Chit. Rep. 466. n. *FLINDT v. BIGNELL*. M. T. 1815. *ibid.*

Motion to make a rule absolute for computing principal and interest. The affidavit did not state that the original rule was shown to the defendant. But the Court refused to alter the established practice of the Court, which seemed to be founded on convenience; and held, that service of a copy was sufficient, and that it was not necessary to show the original rule at the time of service.

20. *DAWSON v. SLADFORD*. T. T. 1819. K. B. 1 Chit. Rep. 468. S. P. *THE BANK OF ENGLAND v. ATKINS*. T. T. 1819. K. B. 1 Chit. Rep. 466.

Judgment in an action on a bill had gone by default. The defendant complained of an irregularity in the subsequent proceedings of the plaintiff; viz. that the order for the reference to the master was not served upon defendant so that he might be present at the taxation. It appeared, that after these proceedings the defendant had been taken in execution, when he had paid part, and given a bill for the remainder of the debt and costs computed. *Bayley, J.* said, must be served with a rule to be present at the taxation of that rule or order upon the defendant; and he afterwards gets an appointment

ration is on a bill, and the defendant demurs to that count, and judgment is given for the plaintiff, the Court will refer it to

If interlocutory judgment on a bill of exchange be signed in the K. B. for want of a plea, a rule may be granted on the same day, for referring the bill to the master; but if such

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In the K. B. the rule nisi and rule absolute, for computing principal and interest on a bill, must both be served on defendant. And where there are

It is sufficient that a copy of the rule has been served, and it is not necessary that the original rule should be shown.

And where the judgment is by default, the defendant, it has been said, must be served with a rule to be present at the taxation of

costs; the Court, therefore, even where defendant had paid

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part, and given his acceptance for the remainder of the debt and costs computed, set aside the proceed

from the master for the taxation of costs. He then serves the defendant with a rule to be present at the taxation, in order that he may be aware at what time the appointment is made. Although the defendant has notice of the order for referring it to the master, yet he is not thereby informed at what period the master will tax the costs, and consequently does not know at what time he is to be present. Therefore it appears to me that the defendant should be served with a rule to be present at the taxation of costs.—Upon its being insisted that defendant was not prejudiced, inasmuch as he never intended to be present at the taxation of costs, but, on the contrary, on being taken into custody, made the proposition already referred to, Abbott, C. J. said, I cannot consider that an act done by a prisoner, in order to obtain his liberty, is a waiver of his right afterwards to contest the legality of his imprisonment. The rule must be, however, made absolute, upon the condition that the defendant shall not bring any action against the plaintiff or his attorney.

ings with costs, upon the terms of not bring any action against the plaintiff or his attorney.

21. *HUCKFIELD v. KENDALL*. M. T. 1819. K. B. 1 Chit. Rep. 693. S. P. ANOV. H. T. 1816. id. 466. n. S. P. *SELLERS v. SUFTON*. H. T. 1813. *ibid*.

Bat in a subsequent case it has been hold en, that the plaintiff is not bound to serve the defendant with notice of an ap

A rule nisi had been obtained to refer a bill of exchange to the master to compute principal, interest, and costs, and afterwards made absolute; upon which plaintiff sued out execution, without serving defendant with an appointment to attend the taxation; which it was now contended was irregular. But the Court said; these proceedings are quite regular; it is the defendant's own duty to take out a rule to be present, if he wishes to be present; but if he does not choose so to do, the plaintiff is not bound to give him notice.

pointment for taxing of costs, unless defendant has served him with a rule for that purpose.

22. *PRANING v. PATTERSON*. T. T. 1812. C. P. 4 Taunt. 486.

In the C. P. notice must be given to the defendant of the prothonotary's appointment to compute principal & interest. A rule to the master, to compute what is due on a bill, is not affected by any irregularity in the judgment, which can only be set aside by a separate motion.

After judgment in an action on a bill, an order was obtained to refer it to the prothonotary to compute principal and interest. The amount being computed, and the defendant being taken in execution, a rule was obtained to show cause why the proceedings should not be set aside, on the ground that no notice had been given of the day appointed for the computation. And the Court made the rule absolute, being of opinion that the notice was indispensable, in order that the defendant might have an opportunity of bringing forward any facts which have occurred to reduce the sum which the plaintiff has a right to recover.

23. *MARRYAT v. WINKFIELD*. H. T. 1820. K. B. 2 Chit. Rep. 119. S. P. *PELL v. PROWN*. H. T. 1799. C. P. 1 B. & P. 369.

Upon a motion being made to make a rule absolute for referring it to the master to compute principal, interest, &c. upon a bill authorising the defendant to sign final judgment, &c.; a motion was made by the other party to set aside the judgment, on the ground of irregularity. But Holroyd J. said: the irregularity must be the subject of a counter motion to set aside the judgment, and cannot be made available in showing cause against this rule. A rule nisi for setting aside the judgment may be therefore taken, and the rule of reference to the master may be enlarged until the former is disposed of. This was agreed to. See 4 Taunt. 487; Tidd. 7th edit. 591.

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(k) *Evidence for the plaintiff.**

1st. *Producing the bill or note*. See *ante*, div. Of lost and destroyed Bills and Notes, p. 420.

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To prove the original contract, the bill or note must in general be produced; and if there be foreign bills drawn in sets, both sets must be produced, when an objection may be taken to the insufficiency of the stamp. See *ante*, p. 299. The production of the bill or note is dispensed with in special cases only, as where it can be shown that the bill or note has been lost or destroyed by the defendant; see *ante*, p. 422; Ld. Raym. 731; or that it is in the hands of the defendant, and that he has had notice to produce it. See 2 B. & P. 39. In

* The only proof requisite in common cases is the production of the bill or note, the correspondence of the instrument with the averment in the declaration, the signature of the defendant or of his authorised agent, and his identity.

these cases a copy or parol evidence of its contents may be received. But as these instruments are negotiable, direct proof should be given of their destruction, or it must be shown that the defendant cannot be again called on for payment. See 2 Campb. 211; 6 Esp. 125; 3 Campb. 124; 4 Taunt. 602; 4 Esp. 159. Where a bill has been, however, indorsed specially to the plaintiff, the plaintiff may prove that it has been stolen, without having been indorsed by him, and recover on giving parol evidence of its contents. See 2 Campb. 214. abridged *ante*, p. 423.

2d. *Of proving that the bill or note corresponds with the instrument described in the declaration.*

1. *As to date.* See *ante*, p. 508.

2. *As to the making and acceptance.*†

1. **POWELL v. FORD.** T. T. 1817. 2 Stark. Rep. 164.

In an action by payee against acceptor of a bill of exchange, the only evidence adduced to prove the defendant's handwriting was that of a man who, it appeared, had only seen him write his christian name with his initials, and his surname once only; this was held by Lord Ellenborough, C. J. insufficient, since the witness had never seen the defendant write his christian name; and that, it being necessary to prove the christian name as well as the surname, the plaintiff must be nonsuited.

2. **BINKLEY v. SMITH.** Guildhall Sittings, 1798. 2 Esp. 697.

Action against drawer of a note. One A. B. having subscribed her name as an attesting witness, and having since married the plaintiff, Lord Kenyon, C. J. said, the subscribing witness being incapacitated, proof of her handwriting is admissible.

3. **SMITH v. BELLAMY.** M. T. 1817. 2 Stark. Rep. 223.

Action brought by second indorsee against the drawer on a bill, drawn on Stevenson, payable in London, with an acceptance thereon, payable at Spooner's and Co. It had been presented there, and there only; the acceptance was upon the bill when the plaintiff took it, but there was no evidence that it was so when defendant indorsed it and passed it away; it was urged that the jury might presume it was on the bill when plaintiff took it. But Lord Ellenborough, C. J. thought not; and as proof of the acceptance was necessary to make the presentment valid, he nonsuited the plaintiff.

4. **GRAY v. PALMERS ET AL.** E. T. 1794. N. P. 1 Esp. 135.

Action against J. P., C. P. and E. H. as makers of a note. E. H. pleaded a judgment recovered, and each of the P's *non assumpsit*; upon the trial, on the *non assumpsit*, the plaintiff proved the subscription by each of the P's and there rested his case. The P's contended, that he ought to prove H's subscription also; but the plaintiff insisted that that was admitted by the plea of judgment recovered. Lord Kenyon, C. J. however, held that it was only admitted as against H. not against the P's, and that the plaintiff could not recover against them without proving it.

5. **GREEN v. HEARNE.** E. T. 1789. K. B. 3 T. R. 301. **S. P. ANON. H. T. 1761.** C. P. 3 Wils. 155; **S. C.** by the names of **Snowden v. Thomas.** 2 Elac. 748. **S. P. MILLS v. LYNE.** H. T. 1786. K. B. Cited Bayley on Bills, 385.

Upon a rule *nisi* to set aside an inquisition against the acceptor of a bill of

* The acceptance of the bill, or making the note, must be proved by showing that the signature of the bill or note is the defendant's hand-writing; but if there be a subscribing witness, he must be called; however, if the acceptor or maker acknowledges his hand-writing, or impliedly admits its liability, proof of the acceptance is dispensed with. If the acceptance be by an agent, his acceptance as well as his authority, must be proved; see *ante*, 314. So if a bill be accepted, or a note made by several persons, proof of the signature of each is indispensable; see *ante*, 324. And if it be signed by one, in the name of the firm, it must be proved they are partners; see *post tit. partners*. The proof of the acceptance will vary according to the manner in which the bill has been made, for an acceptance might formerly have been by parol; as to parol acceptances, see *ante*, 362; so if there be a conditional acceptance, the performance of the condition must be proved; see *ante*, 371. So proof that an acceptance had been cancelled, because it was accepted by mistake, is admissible; see *ante*, 375.

Handwriting of the [537] acceptor, whether there is both christian and surname, is not sufficiently proved by one who has only seen him write his former name with the initials.

And if there be an attesting witness who becomes incapacitated, evidence of his handwriting is sufficient.

Proof that a bill purported to have been accepted, when it was indorsed to the plaintiff does not supersede the necessity of proving an actual acceptance. So if in an action against A, and B. as makers of a note, A. suffers judgment by default, the signature of A. must be proved at the trial against B. But if the defendant suffers judgment by default, the acceptance need not be proved at the inquisition.

So an acknowledgment of a party's hand-writing, pend

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ing a treaty of compromise, is admissible evidence.

And precludes the party from afterwards setting up a defence of forgery. And where the defence is, that the acceptance has been forged, a witness who has merely seen him sign his name pending the action, cannot be called to establish the forgery.

[539]
An allegation that a bill was presented by J. S. does not render it essential to show that a presentment by J. S. was made.*

If a bill of exchange be given in satisfaction of another bill dishonoured, which second bill is also shown to be dishonoured, a party sued upon the original bill must, if he contends that such

exchange, it was urged that the bill, though produced before the jury, was not proved. But the Court held, by suffering the judgment, the defendant admitted the acceptance of the bill, and that he was liable to its amount; and Buller, J. said, the only reason of producing the bill was to see if any part of it is paid.

6. WALDRIDGE v. KENNISON. E. T. 1794. K. B. N. P. 1 Esp. 143.

Action against two, as acceptors of a bill. The only evidence of the signature by one was an admission he made pending a treaty for settling the cause. It was objected that this admission ought not to be received in evidence, because it was made under the faith of a compromise. But Lord Kenyon, C. J. was of opinion, that the admission of a handwriting might be received in evidence.

7. LEACH v. BUCHANAN. M. T. 1802. K. B. N. P. 4 Esp. 226. S. P. COOPER v. LE BLANC. T. T. 1736. K. B. 2 Stra. 1051.

Indorsee against acceptor of a bill. Defence, that the acceptance was a forgery. It appeared the plaintiff, before he took the bill, sent a person with it to the defendant to inquire whether the acceptance upon it was his hand-writing; the defendant said it was, and that it would be duly paid. Per Lord Ellenborough, C. J. Forgery is no defence; the defendant having so accredited the bill, and induced a person to take it, cannot now say it is a forgery.

8. STRANGER v. SEARLE. E. T. 1793. K. B. N. P. 1 Esp. 15.

Action against the acceptor of a bill. Defence, forgery. To prove the fact, the defendant called a witness, who stated that he had, previous to the trial, seen the defendant write his name for the purpose of showing him his true signature, and to enable him to prove the forgery. But Lord Kenyon, C. J. held the witness incompetent, because the defendant might write his name differently with a design to deceive.

3, *As to names and allegation of signature.* See ante, p. 512.

4. *As to consideration.* See ante, p. 325.

5. *As to delivery.* See ante, p. 413.

6. *As to presentment.* See ante, div. Presentment for payment.

BOEHM v. CAMPBELL. M. T. 1818. C. P. N. P. Gow. 55.

In an action by drawer against guarantee of acceptor; the declaration averred that the bill was presented for payment by one J. S. at the place where the acceptance made it payable; plaintiff proved a presentment there, but not by J. S. Dallas, C. J. held the substantive part of the allegation proved, and plaintiff had a verdict.

(1) *Evidence for defendant.*†

BISHOP v. ROWE. SAME v. BAYLY. H. T. 1815. K. B. 3 M. & S. 362.

Plaintiff sued the drawer and acceptor of a bill, and proved the necessary facts. Defendant gave in evidence that after the bill was due, and part paid, one Tucker, who had been connected with the bill, but had not indorsed it, drew for the balance on Lewis, at two months, and gave plaintiff the draught. Plaintiff could not prove that the draught was presented for payment, but he nevertheless had a verdict. The Court, however thought that proof essential, and granted a new trial. On the second trial, plaintiff gave this proof, but he could not prove that he had given notice to Tucker of the dishonour. The point was saved, whether he was bound to give this proof; and on rule for nonsuit, and cause shown, the Court held it sufficient for him to prove presentment and non-payment, for that showed there had been no payment in fact; and if the defendant insisted there had been such neglect as amounted to pay

* So a variance as to the time of presentment and acceptance is not material; Forman v. Jacob, 1 Stark 46. abridged ante.

† The defendant, under the general issue, may give in evidence, that the contract is insufficient in point of law; see ante 277 and 288; or for want of a proper stamp, see ante, 305; or that the bill or note has been altered; see ante, 347; or there was no legal consideration; see ante, 325; or that the bill has been satisfied; see ante, 591; or the parties released; or that the parties have been discharged by laches; see ante, 453; or that it is an accommodation bill, and indorsed after it became due; see ante, 327.

ment in law, he should have shown it.—Rule discharged. See Salk. 124. 442; Skin. 410; 4 Esp. 46. 3 & 4 Ann. c. 9. s. 7.

(m) *Witnesses.* See Post 566.

(n) *Sum recoverable.*

1. BLANEY v. HENDRICKS. E. T. 1770. C. P. 2 Blac. 761.

Per Cur. On all bills of exchange, or promissory notes, payable at a day certain, or after demand, if payable on demand, interest attaches.

2 ROBINSON v. BLIND. M. T. 1760. K. B. 2 Burr. 1077. S. P. ATKINS v. WHEELER. T. T. 1806. Ex. Chamb. 2 N. R. 205. S. P. SYDERBOTTOM v. SMITH. M. T. 1726. K. B. 1 Stra. 649.

On a case reserved for the opinion of the Court, as to what damages the plaintiff was to receive on judgment in an action on a bill of exchange.

Per Cur. Although this be nominally an action for damages, and damages be nominally recovered in it, yet it is really and effectually brought for a specific performance of the contract. Here the jury have left the matter quite open to us. We can bring the interest down to the time of the liquidation of the sum really due from the defendant to the plaintiff; which is the time of giving judgment. Therefore let judgment be entered for the plaintiff.

3. COTTON v. HORSMANDEN. H. 1727. C. P. Prac. Reg. 357.

The Court said, that in actions upon promissory notes payable on demand, interest should be given from the time of the demand proved.

4. KENNERLY v. NASH. M. T. 1817. N. P. 1 Stark. 452. S. P. COTTON v. HORSMANDEN. H. T. 1727. C. P. Prac. Reg. 357.

In an action on a bill payable at four months after date, bearing interest, Lord Ellenborough. C. J. held that these words entitled plaintiff to interest from the date of the bill, for without them he would have been entitled to it from the time it became due.

5. MURRAY v. THE EAST INDIA COMPANY. M. T. 1821. K. B. 5 B. and A. 204.

An action having been brought by an administrator upon certain bills of exchange, accepted posterior to the decease of his testator, interest had been taken from the time that they respectively fell due. But the Court, upon a case reserved, held that although the plaintiff was entitled to recover interest, yet that the calculation must begin from the time of the demand of payment by the plaintiff, and not sooner.

6. DENT v. DUNN. EXECUTRIX. M. T. 1812. N. P. 3 Camp. 296. S. P. ANON E. T. 1704. K. B. 6 Mod. 138.

In this case it appeared the defendant gave her agent a sum of money, to take up a bill; the agent attended for such purpose; but plaintiff had mislaid it; in an action on the bill the question was, up to what time was interest to be computed, to the tender, or to the time of action. Lord Ellenborough said; interest was a compensation for money lent and forborne by the lender. It was frequently recovered in the shape of damages for money improperly retained but interest could not be obtained after an offer to pay the principle. It [541] made by himself.

7. WALKER v. BARNES. M. T. 1813. C. P. 1 Marsh. 36; S. C. 5 Taunt. 240.

To an action on a bill of exchange, the defendant pleaded *non assumpti*, and a tender. It appeared on the trial, that the defendant was drawer of a bill of exchange, which had been dishonoured by the acceptor on the 11th June, on the following day the holder sent by letter notice to the defendant that the bill had not been paid; and the latter on the 13th tendered to the plaintiff the amount of the bill, which the plaintiff refused to accept, on the score that as the space of two days had elapsed between the maturity of the bill, and the day of tender, he was entitled to interest on the bill for that period. The jury found for the defendant, open to a motion on the part of the plaintiff to enter a

* See D. Mar. 2d. edit. 13.

† And all incidental expenses; See Aural v. Thomas, 2 T. R. 52. abridged post, 545.

‡ But where by the terms of a note defendant undertook to pay legal interest, on demand, Lord Ellenborough C. J. held, that it must mean from the date of the note; Hopper v. Richmond, 1 Stark. 507; abridged ante vol. iii. p. 853.

bill has been satisfied in law by the want of notice of the dishonour to the party giving it, show [540] that no notice was given.

The plaintiff is entitled to the amount specified in the bill,* with interest.† From the time the bill was payable down to judgment.

And on notes payable on demand; Or after date, interest runs from the demand or date.‡

An administrator suing upon bills accepted after his testator's death, can only recover interest from the time of demand of payment

[541] made by himself. But after a tender of what is due, interest ceases.

Hence, if a drawer of a bill offer payment the day after he has notice of its dishonour, it is within reasonable time; therefore no in

terest accrues to the holder from the period of the dishonour till such time.

verdict in his favour. On a rule nisi for that purpose, the plaintiff's counsel contended, that as a drawer was a guarantee for an acceptor, he was liable for all damage that might arise to the holder in consequence of the non-performance of the acceptor of his contract, that the commencement of the damage must be dated from the period of the dishonour of the bill, and that though the drawer could not discharge his engagement till he knew of the failure of the acceptor to pay, yet on such notice being given, his liability to the holder for the damage he had sustained, had relation back to the time when he ought to have been paid by the acceptor. Mansfield, C. J. said, though a drawer is liable to pay a bill on notice so to do by an acceptor, he must still be allowed a reasonable time for that purpose, which we do not think the defendant has exceeded.—Rule discharged. See 8 East. 168.

Although it would seem by statute that a neglect to prove a protest upon any inland bill for the payment.

By the 3 & 4 Ann. c. 9. s. 5. it is provided that if such bill be not accepted by such underwriting, or indorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for the non-acceptance thereof, and within 14 days after such protest the same be sent, or otherwise notice thereof be given to the party from whom such bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given, in manner and form above mentioned. Nevertheless, every drawer of such bill shall be liable to make payments of costs, damages, and interest upon such inland bill, if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left, as aforesaid.

Of 20l. would preclude the holder from [542] recovering interest.

And by section 6. it is provided that no such protest shall be necessary, either for non-acceptance or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed in such bill to be received, and unless such bill be drawn for the payment of 20l. sterling or upwards; and that the protest hereby required for non-acceptance, shall be made by such persons as are appointed by the act of 9 & 10 W. 3. c. 17. to protest inland bills of exchange for non-payment thereof.

8. WINDLE V. ANDREWS. T. T. 1718. K. B. 2 B. & A. 696. more fully abridged ante, 490.

It has been decided to have no influence.

In an action on an inland bill, a rule nisi was obtained to strike the interest out of the verdict, on the ground that there had been no protest, as specified by the 3 & 4 Anne; but the Court held the want of a protest no ground for disallowing interest where notice of dishonour had been duly given.

9. DU BELLOIX V. WATERPARK. H. T. 1822. Cited Bayley on Bills. 281. 4th edit.

But whether the holder is entitled to interest, is a question for the jury.

Payee against maker on a note of 800l. of 27th December, 1787, payable six months after date. The cause was tried in 1821. There was no evidence of any claim upon the note from the time that it was made, and for many years of the intermediate time plaintiff had been an alien enemy. The jury asked if they were bound to give interest; ; and Abbott, C. J. told them that was for their consideration, and they gave none. A motion was made to increase the verdict by adding the interest, or for a new trial; but the Court was clear, that the question of interest was within the province of the jury; that it was in the nature of damages for the non-payment of the debt; that they were to say whether there should be any, and what damages, on that account; and that, in this instance, there was no ground for saying they had not exercised their discretion rightly. Abbott, C. J. added, that during the time the plaintiff was an alien enemy it would have been illegal to have paid him the debt; and that for that interval, therefore, damages could not legally have been given. The rule was refused.

The drawer of a foreign bill is liable for

10. MELLISH V. SIMEON. M. T. 1794. C. P. 2 H. Bl. 378.

A bill was drawn in London upon Paris, and negotiated through Holland. Before it became due, the French Government prohibited the payment of any

bill drawn in England, in consequence of which it was dishonoured, and sent back through the different hands by which it had before been negotiated at London. The re-exchange between Paris and Holland raised the bill from 603*l.* 19*s.* 10*d.* to 905*l.* 13*s.* 9*d.*, and that between Holland and London to 913*l.* 4*s.* 3*d.* which the plaintiff, the payee, paid; and upon an action by him against the drawer. Eyre, C. J., left it to the jury, whether the defendant was liable for the re-exchange occasioned by returning the bill through Holland, and they found that he was; and on application for a new trial, upon the ground that the defendant was not liable for the re-exchange, because there was no default in him, the payment being prohibited by the Government of France, the Court held it immaterial why the bill was not paid; that as it was not paid, he was liable to all the consequences, of which the re-exchange was one; and the rule was refused.

11. *DE TASTET v. BARING*. E. T. 1809. K. B. 11 East. 265.

A verdict passed for the defendant in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from London on Lisbon. Upon evidence that the enemy were in possession of Portugal when the bill became due, and Lisbon was then blockaded by a British squadron, and there was, in fact, no direct exchange between Lisbon and London, though bills had in some few instances, been negotiated between them, through Hamburg and America about that period; Lord Ellenborough, C. J. told the jury, that if the plaintiffs had paid the re-exchange, or were, in the common course of dealing, liable to pay any, a verdict should be found for them, reserving the question of law, whether, in the relative situation of the two countries at that period, a charge for re-exchange could legally be demanded. A verdict was found for defendants. A motion was now made for a new trial, assuming the verdict to have passed, not upon the ground that there was no exchange in fact between the two countries at the time (the contrary of which the plaintiffs considered to have been shown in evidence,) but that the jury had been led to suppose, by the course which the cause had taken, that the plaintiffs were not entitled to the re-exchange, without proving that they had, in fact, paid it. This, it was contended, was not necessary, but it was sufficient to entitle the plaintiffs to recover, if they were liable to pay the re-exchange to the holders of the bill at the time of the dishonour; and then the question of law, which had been reserved, would arise. A rule nisi having been obtained, Lord Ellenborough said, that as it did not appear to have been clearly made out that there was, at the time, any course of re-exchange between Lisbon and London, the Court must presume that the jury (which he observed was a special jury, consisting of many eminent merchants conversant with the subject,) found for the defendant, on the following ground; viz. that the plaintiff was not liable to pay re-exchange in this case, and not on the ground that the plaintiff had not actually paid it.

12. *NAPIER v. SNEIDER*. E. T. 1810. K. B. 12 East. 420.

A motion being made to refer a bill drawn in Scotland, and accepted by the defendant here, to the master, and to direct him to allow re-exchange, the Court said, that they were clearly of opinion that this could not be allowed against an acceptor here, who, by his acceptance, is only bound to pay what the law of England requires.

13. *GOLDSMIDT AND OTHERS v. TAITE AND ANOTHER*. M. T. 1799. C. P. 12 B. & P. 55.

A rule nisi was obtained in this case for reference to the prothonotary to take an account of principal, interest, exchange, re-exchange, charges, expenses, and costs, of a bill of exchange, or for the execution of a writ of inquiry before the said Chief Justice and a special jury. It was contended for the defendants, that exchange and re-exchange were subjects for the consideration of

the re-exchange and every other expense arising from the non-acceptance or non-payment, notwithstanding the dishonour is expressly ordered by [543]

the country on which it is drawn. Where on a question whether the plaintiff was entitled to re-exchange, the jury on full consideration found for the defendant and it was not clearly apparent that a course of re-exchange subsisted between the two countries, a new trial was refused, because the Court would infer that the verdict went upon the ground that it did not. [544]

But an acceptor is not liable for re-exchange.*

The Court will refer to the prothonotary, the computation of principal interest, exchange, re-exchange and costs.

* If by the terms of a note, the holder has the option of being paid, either at the place where it was made, or according to the course of exchange between that place and another, he may insist upon being paid according to such course of exchange as exists between them at the time when the note becomes due; Pollard v. Harries, 3 B. & P. 35.

Secus, as to charges and expenses.

a jury, but that a common jury were adequate thereto; and as to the reference of the charges and expenses, that it was not the province of a prothonotary to ascertain them. On an offer by the plaintiff's counsel to strike out the words "charges and expenses," and a suggestion that the prothonotary was equally capable with a common jury to compute exchange, &c., the Court made the rule absolute, with the exception of the terms withdrawn by the plaintiff's counsel.

14. *REX V. THE SHERIFFS OF LONDON*. M. T. 1818. K. B. 2 B. & A. 192.

And if the acceptor of a bill of exchange suffer judgment by default, he can only be charged with the costs of the particular action against him self.

The plaintiff in this case brought several actions on a bill of exchange; one against the defendant as acceptor, another against the drawer, and another against an indorser. In the action against the acceptor he obtained an attachment against the sheriff for not bringing in the body. A judge at chambers, in compliance with defendant's request, referred it to the master to compute what was due to the plaintiff, and ordered the attachment to stand as a security for the debt and costs. The master refusing to include, in his taxation, the costs in the three actions, the plaintiff moved for a rule to show cause why a different course should not be pursued by the master, supported by an affidavit, stating it to be the invariable practice in the office of the sheriffs of London, to embody in the taxation the costs of all the actions; but the Court observed, such practice cannot be supported. The sheriff, upon an attachment, is only liable for what the plaintiff would have recovered in the action, had he proceeded to judgment and execution. Now, as the costs in the other actions could not have been laid as special damage, those actions having been commenced at the same time as that against the acceptor, the sheriff's contempt is purged by the master's original computation, in which he included the bill and costs in the action against the acceptor only, and we must refuse the rule. See Str. 575.

15. *AURIOL V. THOMAS*. T. T. 1787. K. B. 1 T. R. 52.

But where a bill is returned to an indorsee dishonoured, he may claim extra [545] charges against the indorser, exceeding five per cent. if they be warranted by usage. An *indebitatus assumpsit* will not lie by an indorsee against the acceptor of a bill of exchange.*

A bill payable in India was indorsed in England for the current price, which then was 6s. 3d. per pagoda; it being returned, the plaintiff recovered on a writ of inquiry, at the rate of 10s. per pagoda, (that being the general charge, including Indian interest, exchange, and other charges,) and also five per cent from the time of notice of non-payment, and the Court held the damages so assessed to be correct.

(D) INDORSEE AGAINST ACCEPTOR OF A BILL OR MAKER OF A NOTE.

(a) *Form of action.*

BROWNE V. LONDON. M. T. 1646. K. B. 1 Mod. Rep. 285; S. C. 1 Lev. 298; S. C. 1 Vent. 152; S. C. 1 Freem. 14; S. C. 2 Keb. 695. 713. 822.

Indebitatus assumpsit for 55*l.* due to the plaintiff upon a bill, accepted by the defendant. After verdict for the plaintiff, it was moved in arrest of judgment, that although a special action upon the case might be supported upon the custom of merchants, yet an *indebitatus assumpsit* could not be sustained. In this view of the case, the Court concurred.—Judgment arrested.

(b) *Affidavit to hold to bail.* See *ante*, vol. i. from 406 to 410.

(c) *Arrest.* See *ante*, p. 505.

(d) *Bail.* See *ante*, p. 506.

(e) *Declaration.* 1st. *Of the count stating the bill or note.*† And see *ante*, p. 508.

1. *LE SAGE V. JOHNSON*. M. T. 1800. Ex. Forr. Rep. 23.

Indorsee against acceptor. The bill was described in the declaration as drawn by one William T., accepted by the defendant, and indorsed by the said William T. to the plaintiff; but the bill produced in evidence was drawn and his indorsement

* This rule proceeds from the want of privity between the parties, and therefore a special *assumpsit* is the only form of action which can be adopted by the indorsee against the maker of a note; *Bishop v. Young*, 2 B. and P. 78, abridged *ante*, vol. ii. p. 414; or the acceptor of a bill; see 2 Chit. Rep. 226; 2 Campb. 186; 3 Price. 263.

† The general rules applicable to the description of the bill or note in the declaration, have already been stated; the cases collected therefore in the text, are confined to those which have occurred respecting the mode of stating the indorsement, and the consequent right conferred upon the indorsee.

by Wingfield T. Macdonald, C. B. held the variance fatal. *Sed vide* Eoughton v. Frere, 3 Campb. 39. abridged post.

2. FORMAN v. JACOB. T. T. 1815. N. P. 1 Starkie. 46.

In this case, which was an action by the indorsee against the acceptor of a bill of exchange, it was objected, that the declaration stated the bill to be indorsed by one Philip instead of Philips; but Lord Ellenborough held the name on the bill, whether true or false, immaterial, if it be his name of trade; and observed, the only question was as to the identity of the person.—Verdict for plaintiff.

3. HEALD v. JOHNSON. M. T. 1804. K. B. 2 Smith. Rep. 44. S. P. SKIP v. HOOK. H. T. 1737. C. P. 2 Com. Rep. 563.

This was an action by the indorsee of a bill of exchange against the acceptor. The declaration, which was in the usual form, was demurred to, *inter alia*, because it did not state, nor did it appear, that the said defendant had any notice of the indorsement of the said bill of exchange; and also, for that the plaintiff had not shown any sufficient legal liability on the defendant to pay, &c. In support of the demurrer it was urged that such notice was essential, and upon this principle, viz. that as the indorsee was a stranger to the original contract, the acceptor could not be required to promise to pay until he had notice of his becoming entitled to require such a promise. *Sed per Cur.* The defendant is the acceptor, and does he not in terms promise to pay any person who by indorsement shall become the holder of the bill? This is the general and indefinite form of his promise at the making of the bill, and by indorsement that becomes particular which was before general. We must therefore give judgment for the plaintiff, and in doing so we shall be deciding upon principle, for notice is not necessary to be alleged, where the thing can be intended to be known without it, as here we have shown it must, from the nature of the original contract.—Judgment for plaintiff.

In a declaration by an indorsee against the acceptor of a bill of exchange,

4. REYNOLDS v. DAVIES. M. T. 1796. Ex. Ch. 1 B. & P. 625.

Error on a judgment of the Court of K. B. The declaration in an action by the indorsee against the maker of a promissory note, payable to A. B. or order, had been demurred to; the causes assigned were, that it is not in and by, &c. alleged, nor does it thereby appear, that any notice was given to the said M. (the maker), nor that he the said M. had any notice of the said indorsement of the said note in the said, &c. without which notice the said M. was not liable by the law of this kingdom to the payment of the money in the said, &c." The Court were of opinion that notice was not essential, and affirmed the judgment.

Or maker of a promissory note, it is not necessary to aver that the defendant had notice of the indorsement. If the indorsement [547]

5 FREDERIK v. COTTON. E. T. 1677. K. B. 2 Show. 8. S. P. FISHER v. POMFRET. E. T. 1697. K. B. Carth. 403.

Indorsee against acceptor of a bill. It was moved in arrest of judgment, that the bill being payable to the order of the plaintiff, it ought to have been averred that no order had been made. But the Court without hesitation decided, that if by deed, bill, or other writing, money is directed to be paid to a man's order, it is due to himself.—The plaintiff had judgment.

6. YOUNG AND ANOTHER v. WRIGHT. M. T. 1807. N. P. 1 Campb. 140.

Action by the indorsees against the maker of a bill of exchange. The declaration stated the indorsement to be made before the bill became due. It appeared one of the indorsers delivered the bill to plaintiff's before it was due, but did not put his name to it until after it became due. Defendant objected on this ground; but Lord Ellenborough said the variance was immaterial; he grounded his decision on the case of Russel v. Langstaff, Doug. 514. although it was the converse, yet the present case must be governed by the same principle.

direct the bill or note to be paid to the order of the plaintiff, it need not be averred that he made no order. But it is not a material variance, that an indorsement is stated to have been made before, and is proved to have been made after it became due.*

Where upon a declaration against B. as an indorser of the bill, it appeared that the bill had been indorsed to B. in blank, and that B. without writing his own name, had converted the blank indorsement into a special indorsement to the plaintiff, it was holden that B. was not liable as an indorser; Vincent v. Hurlock, 1 Camp. 442. abridged ante.

2d. *Of the money counts.*

1. DIMSDALE V. LANCHESTER. T. T. 1803. 4 Esp. 201. S. P. *Per Buller J.*
in MASTER V. MILLER. 4 T. R. 339.

An indorsee may recover the amount of a promissory note in an action for money had and received against the maker; **Action for money had and received.** The plaintiffs, who were bankers, had received a promissory note, made by the defendant, from a customer, and had taken from them when due a forged bank note. The object of this action was to recover the amount of this forged security. It was objected, that an action for money had and received could not be supported, and that the plaintiff should have declared as indorsee of the promissory note. But Lord Ellenborough said, he thought the action maintainable; for when a person has put his name to a note, he thereby acknowledges that he has money in his possession of the payee, and undertakes to pay it to whoever is legally entitled to receive it as the rightful holder.

2. TATLOCK V. HARRIS. E. T. 1789. K. B. 3 T. R. 182.

[548] **Per Lord Kenyon.** An acceptance is evidence of money had and received by the acceptor to the use of the holder; it is an appropriation of so much money to be paid to the person who should become the holder of the bill. See Vere v. Lewis, 3 T. R. 182; Master v. Miller, 4 T. R. 339; Isreal v. Douglas, 1 H. Bl. 242; Highmore v. Primrose, 5 M & S. 65.

3. WHITWELL V. BENNETT. M. T. 1803. C. P. 3 B. & P. 559.

But the presumption of the money having been received to the use of the indorsee, may be rebutted by evidence. **The bill had been incorrectly stated in the declaration, and the plaintiff was obliged to resort to the money counts.** The evidence was, that when the defendant accepted the bill (which was for 30*l.*,) he said, that though the drawer had not remitted to him, he expected that he would, and that as he had a bill of his for 80*l.*, which would be paid, he would take all risks upon himself. The Court said, that if that bill was paid, the action for money had and received would be maintainable on the ground of the defendant's specific appropriation of that money to the payment of the plaintiff's demand; but that as the declaration was upon the bill for 30*l.*, it was a surprise upon the defendant to call for the proof of the non-payment of the other bill, and therefore it would be too much to presume payment of that bill. See observations of Eyre, C. J., in Gibson v. Minet, 1 H. Bl. 602; and Isreal v. Douglas, 1 H. Bl. 239.

4. WAYNAM V. BEND. H. T. 1808. 1 Campb. 175.

And from some observations of Lord Ellenborough, it would seem a doubt, whether the money counts could be made available, as be [549] **Action against the maker of a promissory note, payable to T. L. or bearer.** The declaration averred an indorsement by T. L. Lord Ellenborough held, that the plaintiff having stated such indorsement, though unnecessarily, was bound to prove it, and that he could not recover under any of the money counts, as he was not an original party to the bill, and there was no evidence of any value being received by the defendant from him. See Observations of Lord Kenyon, in Johnson v. Collings, 1 East. 100; Barlow v. Lishop, id. 434-5; and Wills v. Gosling, Gow. Rep. 21.

(f) *Pleas.* See ante, p. 528.

(g) *Paying debt and costs.* See ante, p. 527.

(h) *Judgment by default, and reference to compute.* See ante p. 530.

(i) *Evidence.* 1st. *Of producing the bill or note.* See ante, p. 536.

- 2d. *Of proving that the bill or note corresponds with the instrument described in the declaration.* See ante, p. 536.

3d. *Of proving the transfer.* 1. *By indorsement.**

1. ROSANQUET V. ANDERSON. E. T. 1805. K. R. N. P. 6 Esp. 43.

If several indorsements be set out in the declaration,† **Indorsee of a bill against the acceptor.** The bill was drawn in favour of the drawer, who had indorsed it; and the indorsement, and several others, were stated in the declaration. The plaintiff proved the first indorsement, and, that when the bill became due, the defendant being unable to take it up gave to the plaintiff another in lieu of it. Lord Ellenborough, C. J. held

* Since the indorsee's title arises from the indorsement, he must prove that the bill or note has been transferred to him by producing evidence of that persons or his agent's handwriting.

† But if they be not set out in the declaration, which is the preferable course, proof of the first indorsement, without the intermediate ones, will be sufficient;

that this was an admission of the plaintiff's title, and dispensed with the proof of the several indorsement.

2. *WAYNE v. BEND*. H. T. 1803. N. P. 1 Campb. 175.

Assumpsit. against the maker of a promissory note. No evidence of the indorsement being given, defendant's counsel insisted plaintiff must be called. Plaintiff's counsel contended that the averment was unnecessary, and might consequently be rejected. But Lord Ellenborough said, the averment, though unnecessary, must be proved.

3. *SIDFORD v. CHAMBERS*. E. T. 1816. N. P. 1 Stark. 326.

Action against indorser of a bill of exchange. The plaintiff proved all the indorsements except one; to supersede the necessity of which they gave in evidence a letter written by the defendant to the plaintiffs offering to give them another bill, as he could not take up the original one. Defendants counsel contended, on the authority of *Bosanquet v. Anderson* (*supra*), that the application for a renewal was an admission of defendants liability. Lord Ellenborough, C. J. concurred.—Verdict for plaintiff.

4. *MADDOCKS v. HAYKEY*. E. T. 1797. K. B. N. P. 2 Esp. 647.

Indorsee against the maker of a note. To establish the hand writing of an indorser, it was proved, that during the time he was in prison he acknowledged that the indorsement on a bill was his hand writing. On an objection being taken to this evidence, Lord Kenyon, C. J. overruled it.

5. *SMITH v. CHESTER*. E. T. 1787. K. B. N. P. 1 T. R. 654.

In an action by the indorsee against the acceptor, it appeared that there were several indorsements on the bill at the time of acceptance. The plaintiff could not prove the handwriting of the first indorser, and it was contended that the acceptance admitted this, and that it would be often impossible to prove the handwriting of foreign indorsers; but the Court held that the law was clearly otherwise, and that it was absolutely necessary to prove the handwriting of the first indorser; *vide ante*, p. 385.

6. *MACKFERSON v. THOMES*. M. T. 1790. K. B. N. P. Peake, 20.

Indorsee against the acceptor of a bill of exchange. The plaintiff proved the handwriting of all the indorsers except the first, who was also the drawer. It was urged that the acceptance was an admission of his hand writing; but Lord Kenyon, C. J. rejected the doctrine.

7. *RICHARDSON v. ALLAN*. H. T. 1818. K. B. N. P. 2 Stark. 334.

Action by indorsee against acceptor. A witness was called to prove the indorsement, who said it was not the supposed indorser's handwriting. Plaintiff then proposed to call other witnesses to prove it was; but Lord Ellenborough held, that as plaintiff was not obliged to have called the witness he did, from his being an attesting witness, it was not competent for him to call other witness to contradict him. Plaintiff then proposed to call the indorser himself, and Lord Ellenborough thought he might, because he could speak from knowledge; other witnesses from belief only, and he came to charge himself. He was examined accordingly, but negatived the hand writing; and plaintiff was nonsuited.

2. By delivery.

If a bill or note be payable to bearer, or has been indorsed in blank, *possession* is *prima facie* evidence of delivery and ownership to entitle the owner to sue as indorsee; see *ante*, div. Transfer by delivery.

4th. Of proving the identity of the payee.

1. *BULKELEY v. BUTLER IN ERROR*. M. T. 1823. K. B. 2 B. & C. 434; S. C. 3 D. & R. 625.

Action (brought originally in C. P.) by indorsee against the acceptor of a bill of exchange, whereof E. S. was the payee. The plaintiff proved, that a person calling himself E. T. came to C., having in his possession the bill in

* And therefore the indorsee of a bill, payable to a fictitious payee, cannot recover against the acceptor, unless he can prove that the acceptor knew that the payee was fictitious, or that the money actually found its way into his hands; *Bennett v. Farrell*, 1 Camp. 180.

Although unnecessarily, they must be proved unless they be expressly or impliedly admitted. As by writing a letter to the holder, offering another bill for the one dishonoured. [550] Or by proving an express acknowledgment by the indorser of a handwriting. The indorsements must be proved, notwithstanding they were upon the bill at the time of the acceptance. And the handwriting of the first indorser must be proved even though he be the drawer. Where a witness called to prove an indorsement disproves it, the plaintiff cannot call other witnesses to contradict him, but [551] the indorser may be called to prove his own signature. Where a question as to the identity

of the payee of a bill and it was proved that he came to the plaintiff with a letter of recommendation, admitted to be genuine, by whom he was received, and that he afterwards produced a letter of credit and the bill in question which he indorsed to plaintiff; the Court held these circumstances un rebutted sufficient to justify a verdict for the plaintiff. When a bill is indorsed in blank to a party, to a particular purpose, that party cannot join

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another not necessary to the fulfilment of the intention, in order to bring an action on the bill. A mere notice to prove the consideration does not compel the plaintiff to do so until defendant has cast some suspicion on his title.†

Qy. whether in an action by an indorsee against the

question, and also a letter of introduction (which was proved to be genuine,) which was expressed to be given to a person introduced to the writer as E. S.; and also another bill of exchange drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which he daily visited the plaintiff, indorsed to him the bill in question, and received value for it, and also a letter of credit. No other evidence being adduced of the person calling himself E. S. being the payee of the said bill, it was objected that there was no proof to go to the jury of the identity of the said person calling himself E. S. with the said E. S., the payee of the said bill, and the defendant's counsel then and there prayed the judge before whom the cause was tried, to declare to the jury that there was no evidence before them of the indorsement of the bill by the payee therein mentioned; yet his lordship delivered it as his opinion to the jury, that although in law there should be some proof of the identity of the person making the indorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one; and that, therefore, the above evidence was reasonable evidence to be left to the jury, who declared themselves to be satisfied of the identity of the said E. S. These facts were stated in a bill of exceptions in the court below, which now came before this court on error. *Per Cur.* The question in this cause was, whether the person in possession of the bill was the real E. S. His passing by that name was *prima facie* evidence of his identity; and if that was to be disputed, contrary evidence ought to have been given by the defendants; but the evidence which has been adduced for the plaintiff, was cogent in the first instance; and as it remains un rebutted, it becomes conclusive. The other circumstances stated in the case are also corroborative of the view we have taken of the case. The judgment must be therefore affirmed. See 4 T. R. 92; 3 East. 192; 2 H. Bl. 187; 2 M. & S. 92; 1 B. & A. 20; Dyer. 231. pl. 3; 1 Ld. Raym. 486; 2 Inst. 427; and post, see Exceptions, Bill of.

2. *MACHELL AND OTHERS V. KINNEAR.* M. T. 1816. 1 Starkie's Rep. 499.

This was an action by the indorsees of a bill of exchange against the defendant as the indorser. The defendant, in this case, indorsed a bill of exchange (in blank) to a certain firm, who were trustees for an insolvent, on account of the insolvent's estate; two of the firm, trustees, associated themselves with a third indifferent person for the purpose of bringing an action on the bill. The plaintiff's counsel contended, that since the case of *Orde and others v. Portal*, 3 Camp. 239. an indorsement in blank was considered to convey a joint right of action to as many as agreed to sue upon the bill. But the Court held, that the bill having been indorsed to the firm for a specific purpose, a party not privy to the indorsement could not be joined.

5th. *Of proving the consideration.** See ante, p. 325.

1. *REYNOLDS V. CHETTLER.* H. T. 1811. 2 Camp. 596.

Action by indorsee against acceptor of a bill of exchange. The defendant had given plaintiff notice to prove the consideration he gave for the bill; but Lord Ellenborough said, defendant must first throw some suspicion on plaintiff's title, before the delivery of such a notice will be sufficient to impose the burthen of this proof upon him.

2. *COSTER V. MEREST.* E. T. 1822. C. P. 7 Moore. 87; S. C. not S. P. 3 B. & B. 272.

In an action by the holder against the acceptor of a bill of exchange, the defendant proved that the plaintiff had had notice to prove the consideration on which he became holder of the bill in question, and offered, in support of

* The want of consideration, we have seen is only available as between the original parties therefore it is not in general necessary to prove the consideration in an action by the indorsee against the acceptor of a bill or maker of a note.

† In the King's Bench it is not absolutely necessary to give such notice, although it is usual so to do. But in the Common Pleas, the defendant must give notice of his intention to call upon the plaintiff to prove that he has given value for the bill; *Paterson v. Hardacre*, 4 Taunt. 11, abridged ante.

his title to deliver such notice, certain letters written by the drawer to the plaintiff, which showed that the bill was founded in fraud; and further, had been indorsed to the plaintiff after maturity. No dates, nor post-marks, appeared on the letters; but the jury found for the defendant; and on a rule nisi for a new trial, on the ground that the letters should not have been admitted in evidence, the Court abstained from expressing an opinion on the point, as the rule had been obtained on a more decided ground, but they did not appear to dissent from the verdict for these reasons. See 1 Campb. 177.

the concoction of the bill, coupled with a notice by the acceptor to the indorsee, to prove the consideration, will render such proof incumbent on the plaintiff.

3. DELAUNEY v. MITCHELL. M. T. 1816. N. P. 1 Stark. 439.

Action by indorsee against acceptor of a bill of exchange. Plaintiff's counsel closed his case, and observed, if it became necessary, he was prepared to prove the consideration given for the bill. But Lord Ellenborough said, that since notice had been given, that one ground of defence was want of consideration, plaintiff could not, after closing his case, go subsequently into such evidence.

Where notice has been given the plaintiff ought to prove the consideration in the first instance, or it cannot be gone into in reply to defendant's case. In an action against one of several makers of a note, another maker is a competent witness for the plaintiff to prove the signature of the former. And the drawer of a bill may prove usury in the discounting it; Provided he be released;

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6. *Of the competency of witnesses.*
YORK v. BLOTT. E. T. 1816. K. B. 5. M. & S. 71.

Assumpsit against one or two makers of a note. Plaintiff called the other maker (who acknowledged his own) to prove the defendant's signature to the note. He was admitted at the trial; and on motion for a new trial, the Court thought the witness stood indifferent; for if the plaintiff recovered, he would be liable to pay contribution to the defendant; and if plaintiff failed, and forced him to pay, he would be entitled to contribution from the defendant. They consequently held, that he had been properly admitted, and refused the rule. See Str. 35.

2. BRARD v. ACKERMAN. H. T. 1803. N. P. 5 Esp. 119.

Action of indorsee against the acceptor of a bill. Defence, usury; to prove which the drawer was called. It was objected that he was incompetent. But Lord Kenyon, C. J. overruled the objection, on the ground that the verdict not being available in evidence, in any trial, against the witness, and that the usury did not destroy the bill, so that it could never be produced again.

3. RICH AND ANOTHER v. TOPPING. T. T. 1794. N. P. Peake. 224; S. C. 1 Esp. 177.

Action by indorsee against the acceptor of a bill of exchange. The defendant proposed calling the drawer, whom he had released, to prove the contract to be usurious. Plaintiff's counsel contended that he was not a competent witness, because it would defeat the bill; and discharge himself. But Lord Kenyon said, the acceptor having released him from all claim, cannot again call upon him; and consequently, I think him an admissible witness to prove the fact.—Verdict for plaintiffs. See Brard v. Ackerman, 5 Esp. 119; Kent. v. Lowten, 1 Camp. 177; Smith qui tam, v. Prager, 7 T. R. 60; Ilderton v. Atkinson, 7 T. R. 481; Birt v. Kershaw, 2 East. 461; Clepsam v. O'Brian, 1 Esp. 10.

4. JONES v. BROOKE. T. T. 1812. C. P. 4 Taunt. 464.

Action against the acceptor of a bill. The acceptance was without value to accommodate the drawer. The drawer's wife was called as a witness for the defendant, to prove that the drawer indorsed away the bill upon a usurious consideration. The witness was objected to, but the objection was overruled. On a rule for a new trial, the Court held the drawer had a direct interest to defeat the action, because otherwise he must indemnify the defendant against the costs, as well as pay him the amount of the bill; that the wife therefore was incompetent.

And it be not an accommodation bill.

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5. DICKINSON v. PRENTICE. T. T. 1801. K. B. N. P. 4 Esp. 32.

Action against the acceptor of a bill. Defence, that the acceptance was forged. To prove the defendant's handwriting, the plaintiff called the drawer. He was objected to, on the ground that the forgery could only be imputable

And the drawer of a bill who is suspected of having

forged the acceptance is not with standing, a good witness to

prove the handwriting of the acceptor. So he is competent for the acceptor to prove that the bill has been paid. So is the indorser. It has been doubted, whether the indorser of a bill is competent to invalidate it.

Though it has since been held on, that the indorser is incompetent to disprove the [555] indorsee's title, not withstanding a release.

But a prior indorser is a competent witness for the indorsee to prove that the witness indorsed the bill. Debt or in *debitatus assumpsit* lies by the payee against the drawer, when the bill is exchanged to be for value received.*

to him; and that, as he might be committed for a capital offence, if the forgery were established, he had such an interest as ought to disqualify him. But Lord Kenyon, C. J. said, it was no objection to his legal competency, being merely matter of observation as to his credit.

6. HUMPHREY A. MOXLON. E. T. 1791. N. P. Peake. 52.

Action by indorsee against the acceptor. Defendant was about to call the drawer to prove that the bill had been satisfied by him. His evidence being objected to, Lord Kenyon, C. J. overruled the objection, and said, the rule of law is, that no man can destroy his own security; but this party only comes to show that it has been duly paid.

7 CHARRINGTON V. MILNER. E. T. 1790. N. P. Peake. 6.

Indorsee against the maker. Defendant called the indorser to prove that he had paid the money to the plaintiff, for which the note was indorsed. It was urged that the witness could not be allowed to invalidate his own note; but Lord Kenyon said, he was a competent witness, as his evidence did not prove the note originally bad. See Salk. 287. pl. 22; 2 Ld. Raym. 1007.

8. ADAMS V. LINGARD AND ANOTHER. E. T. N. P. Peake. 118.

Indorsee against acceptor of a bill. The indorser was called by the defendant to prove that the bill, though dated abroad, was in fact drawn in England and therefore void for want of a stamp. It was objected, that he was incompetent, because his evidence tended to destroy his liability. But Lord Kenyon, C. J. held his evidence admissible, though, he said, other judges entertained a different opinion.

9. BUCKLAND V. TANKARD. E. T. 1794, K. B. 5 T. R. 578; S. C. 1 Esp. N. P. 85; S. C. Pul. N. P. 288.

In an action by B., the indorsee of a bill of exchange, against the acceptor the latter proposed to call A., who was the drawer and indorser of the bill (it being payable to his own order, and he having a release,) to prove that B., the plaintiff, had no right to recover upon it, having merely received it in trust from A., to procure payment from the acceptor on A's account, and having paid no consideration; but A., on being asked whether he claimed an interest in the bill, answering in the affirmative, Lord Kenyon, C. J. refused to admit him. And on motion for a new trial, it was argued, that A was competent, as his interest must rather incline him to support than defeat the action; for if the indorsee was defeated in the present suit, he might sue A. as indorser; whereas, if he recovered, and the acceptor had received no consideration for accepting, the latter could not recover the amount against A., on account of the release given. But the Court refused the rule; for the question is, whether A's situation would be bettered by the event of the verdict; and if plaintiff succeeds, A. would be put to much greater difficulties to get back the money, than if he were defeated.—Rule discharged.

10. RICHARDSON V. ALLAN. H. T. 1818. 2 Starkie's Rep. 334.

Action by indorsee against acceptor of a bill of exchange. The plaintiff called a prior indorser to prove his own handwriting; which Lord Ellenborough, C. J. allowed, because, by acknowledging it, he charged himself.

(j) *Sum recoverable.* See ante, p. 540.

(E) PAYEE AGAINST THE DRAWER OF A BILL.

(a) *Form of action.* See ante.

HODGES V. STEWARD. E. T. 1692. Skin. 346. *Semb.* S. P. WELSH V. CRAIG. H. T. 1725. 1 Stra. 680; S. C. 8 Mod. 373. HORN V. COOPER. T. T. 1724 K. B. 11 Mod. 385.

In this case it was said that an *indebitatus assumpsit* does not lie upon a bill of exchange against the acceptor; but against a drawer, for *value received*, it might be sustained, for this is for the apparent consideration. See Bishop v. Young, 2 B. & P. 78; Stratton v. Hill, 3 Price. 253.

(b) *Affidavit to hold to bail.* See vol. i. from p. 406 to 410.

(c) *Arrest.* See ante, p. 505.

* But the usual remedy is a special *assumpsit*.

(d) *Bail*. See ante, p. 506.

(e) *Declaration*.

1st. *Of the count stating the bills*. As to the mode of describing the bill, see ante, p. 508. [556]

1. *MERCER v. SOUTHWELL*. M. T. 1681-2. K. B. 2 Show. 180.

Assumpsit on the custom of merchants against the drawer of a bill. It was objected, on demurrer, that the declaration only averred that the drawee did not accept it, but did not say that it was shown or tendered to him. The declaration was holden ill; for if the allegation was dispensed with, it would be in the plaintiff's power to charge the drawer, when, perhaps, the drawee was ready to pay the money, according to the tenor of the bill, if it had been tendered to him.—Judgment for defendant. See Doug. 54; 2 Stra. 949; 3 Wils. 17; Doug. 679; 5 Burr. 267; 2 T. R. 713. [556]

2. *RUSHTON v. ASPINAL*. T. T. 1781. K. B. 2 Doug. 680.

In an action in the court of the county palatine of Lancaster, by the indorser of a bill payable three months after date, against the indorser, the declaration stated, that the bill, after the making thereof, to wit, on the same day and year aforesaid (referring to the day the bill bore date,) was presented for acceptance and accepted; yet the drawer, although afterwards, to wit, on the same day and year aforesaid, requested, did not pay; of which, the drawer, notice of the payee, the first indorsee, and the acceptor, had notice; by reason whereof the defendant became liable to pay, and being so liable, on the same day and year promised to pay: there was a general verdict for the plaintiff, and judgment being entered, the record was removed into this court by writ of error, and two objections were insisted upon; 1st, that the declaration did not allege a demand on the acceptor; 2dly, that it did not state notice, to the defendant, of the acceptor's refusal to pay. The answer was, that, after verdict, it must be presumed that these facts were proved at the trial. And that the latter refused to pay, and that the defendant had notice of the dishonour;

Per Cur. Our wishes strongly incline us to support the judgment; but on looking into the cases, we find the rule to be, that where the plaintiff has stated his title, or ground of action, defectively or inaccurately (because, to entitle him to recover, all circumstances, necessary in form or substance, to complete the title, so imperfectly stated, must be proved,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title, or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption. In the present case it was not requisite for the plaintiff to prove either the demand on the acceptor, or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged; if they were to be presumed to have been proved, no proof at the trial can make good a declaration which contains no ground of action on the face of it; the promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain promises, from which such an inference can be drawn; Lord Mansfield, in *Avery v. Hoole*, E. T. 18 Geo. 3. said, "A verdict will not mend the matter where the gist of the case is not laid in the declaration, but it will cure ambiguity;" and there is a strong case in 2 Salkield. 662. of an action for keeping a malicious bull, where the *scienter* having been omitted in the declaration, it was held bad after verdict; therefore we are all of opinion that there should be judgment for the plaintiff in error.—Judgment reversed. See *Lundre v. Hobertson*, 7 East. 231. [557]

3. *STARKE v. CHEESMAN*. H. T. 1699. K. B. Carth. 509; S. C. 1 Salk. 128; Carth. 509.

In an action upon a bill drawn by the defendant on C. C., of Radcliffe. London, the declaration merely stated, that the said C. C., at Radcliffe aforesaid, or elsewhere within the kingdom of England, was not found; and after judgment by default, it was objected in arrest of final judgment that it was not

* For it has been decided, that under an allegation that the bill was presented, and acceptance or payment refused, the plaintiff cannot give in evidence that the drawee could present or not. Or if the drawee could not be found, the fact should be alleged in the declaration, as an excuse for presentment.*

shown that any inquiry had been made after him; but it was answered that it was according to the custom among merchants, and the common form in like cases; and judgment was given for the plaintiff.

4. CORY v. SCOTT. T. T. 1820. K. B. 3 B. & A. 619.

Qy. whether under an allegation of notice of dishonour of a bill evidence can be given of what would excuse notice. In an action by indorsee against drawer, the declaration stated presentment for payment and dishonour, whereof drawer afterwards, &c. had notice. At the trial there was no evidence of notice, but plaintiff proved that defendant had no effects in the drawer's hands. Defendant rebutted this proof by showing that he and the acceptor only lent their names to a subsequent indorser, and, therefore, that defendant on paying the bill, would have been entitled to sue acceptor and the subsequent indorser. Under these circumstances, Abbott, C. J. held notice necessary, and nonsuited the plaintiff, with leave, however, to move to enter a verdict.—Rule nisi accordingly. On cause shown, it was urged, that under the allegation of notice plaintiff had no right to give evidence of what went only to excuse want of notice; and of that opinion were Bayley and Holroyd, Js.; but on the merits they agreed with Abbott, C. J. that defendant was entitled to notice, and the rule was discharged.

See 7 East. 359; 12 id. 171; 2 Esp. 550; *Patience v. Townley*, 2 Smith. Rep. 223.

It seems in the case of a foreign

5. PATTERSON v. BECHER. M. T. 1821. C. P. 6 Moore. 319. GALE v. WALSH. E. T. 1793. 5 T. R. 239.

A question having arisen in this case, whether protest of the non-payment of a foreign bill of exchange, should have been proved, the Court said. It is quite clear that it need not be averred in the declaration that protest of non-payment was made; it would be sufficient to prove such protest on the trial.

See 4 Esp. 48

6. BROUGH v. PERKINS. M. T. 1703. K. B. 6 Mod. Rep. [80; S. C. Holt. 121; S. C. 2 Lord Raym. 992; S. C. 1 Salk. 121; 3 id. 69. S. P. HARRIS v. BENSON. T. T. 1732. K. B. 2 Stra. 910. S. P. BROUGH v. PERKINS. M. T. 1702. C. B. 1 Salk. 130. BOULAGER v. TALLEYRAND. E. T. 1797. N. P. 2 Esp. 550. *contra*.

As well as an inland bill, a protest need not be averred.*

In an action against the drawer of an inland bill, it was insisted upon for error, that it did not appear by the declaration that the bill had been protested.

And where it is stated that the bill was protested, it is untechnical to allege that the plaintiff protested, or caused to be protested.

Sed Per Holt, C. J. On an inland bill no protest was necessary by the common law, and the statute does not destroy or take away the party's action where there is no protest; nor is the want of a protest any bar to the action; but the act seems only to take away from the plaintiff his right to recover interest and damages where he has not made a protest, or to give the drawers a remedy against him by way of action for their costs and damages.

7. WITHERLEY v. SANSFIELD. M. T. 1689. K. B. 1 Show. 126.

The declaration upon a foreign bill, stated that the plaintiff "protested it," or caused it to be protested; the defendant pleaded that he was not a merchant and upon demurrer had judgment. A writ of error was brought; and it was then for the first time urged, that the allegation that the plaintiff protested the bill or caused it to be protested, was uncertain; but the Court thought it well enough, reversed the judgment below and then judgment was given for the plaintiff.

And even before the later cases it was held on, that the omission to state the protesting of foreign bills, could only be taken advantage of by special demurrer.

8. SOLOMONS v. STAVELY. Cited 2 Doug. 684. n. S. P. BROUGH v. PERKINS. M. T. 1762. K. B. 1 Salk. 130.

On the authority of a precedent in *Dunstan v. Pierce*, Litt. Ent. 55. the Court held that the neglect to allege a protest in an action on a foreign bill was matter of form only, and could not be taken advantage of on general demurrer.

2d. *Of the money counts.*

A bill is *prima facie* evidence of money lent by the payee to the drawer, that if the plaintiff fail on the special count, he may recover on the common count for money lent, or for money had and received, without any proof of consideration.

* Even to enable the plaintiff to recover interest from the drawer; *Windle v. Andrews*, 2 B. & A. 696.

(f) *Of the place.* See *ante*.

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(g) *Paying debts and costs.* See *ante*.

(h) *Evidence.*

1st. *By producing the bill or note.* See *ante*, p. 536.

2d. *Of proving that the bill or note corresponds with the instrument described in the declaration.* See *ante*, p. 536.

3d. *Of proving the presentment.*

As the drawer is only liable on the dishonour of the bill by the drawee, proof that the drawer has been called on for payment is indispensable; see *ante*, p. 357 and 432; and that fact should be proved by the person who presented the bill for acceptance or payment.

4th. *Of proving the notice of dishonour.**

1. LANGDON v. HULLS. T. T. 1804. K. B. 5 Esp. 156.

Action against drawer of a bill; to prove notice of non-payment the plaintiff's attorney was called, who had written the letter, and he having stated that he had written such a letter, was proceeding to state the notice of non-payment; which he had a copy; but no notice having been given to produce the original, it was objected that evidence of the contents of the letter could not be given, as no notice had been given to produce it. And of that opinion was Lord Ellenborough, C. J.

Formerly the copy of a letter containing a notice of dishonour could not be given in evidence, unless notice had been given to produce the original. But now a different rule obtains.

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2. KINE v. BEAUMONT. E. T. 1822. C. P. 7 Moore. 112; S. C. 3 B. & B. 288. S. P. ROBERTS v. BRADSHAW. E. T. 1815. N. P. 1 Stark. 28. S. P.

ACKLAND v. PEARCE. H. T. 1811. 2 Campb. 599. S. P.

The plaintiff having offered to prove the dishonour of a bill of exchange by the copy of a letter sent by the plaintiff, the indorsee, acquainting the defendant, the indorser, that the bill had been dishonoured, it was objected for the latter, that it was incumbent on the plaintiff to have given to the defendant notice to produce the original. The plaintiff had a verdict subject to permission to defendant to move to set it aside. On rule nisi for that purpose, the Court were of opinion that a letter conveying intelligence of the dishonour of a bill of exchange must be considered in the light of a notice to that effect, and therefore that a copy of such document was good, though the defendant's notice had not been given in to produce the original.—Rule discharged. See 1 Stark. N. P. C. 28; 1 Phillips on Ev. 449. 5th edit.

5th. *Of proving a protest.*

ORR v. MAGINNIS. E. T. 1806. K. B. 7 East. 358. S. C. 3 Smith. Rep. 328.

S. P. GALE v. WALSH. E. T. 1793. K. B. 5 T. R. 233.

Per Lord Ellenborough, C. J. Proof of a protest for non-acceptance of a foreign bill of exchange, is necessary to enable the payee to recover against the drawer; and the want of it is not supplied by proof of a noting for non-acceptance, and a subsequent protest for non-payment. See 2 T. R. 714; 5 id. proved. † 239. B. N. P. 271.

The protesting of the bill, if it be a foreign one, must be proved. †

6th. *Of proving the consideration.* See *ante*, p. 325. 552.

7th. *Of the competency of witnesses.* See *ante*, 553.

(i) *Judgment by default.* See *ante*, p. 530.

(j) *Sum recoverable.* See *ante*, p. 540.

(F) INDORSEE AGAINST THE DRAWER AND INDORSER OF A BILL OR MAKER OF A NOTE.

(a) *Form of action.*

STRATTON v. HILL. H. T. 1817. K. B. 2 Chit. Rep. 126; S. C. 3 Price. 253.

Declaration in debt by the indorsee against the drawer of a bill payable to his own order. A rule nisi had been obtained in arrest of judgment, it being objected that debt would not lie against the maker of a bill of exchange, and

Debt will lie by indorsee against [561]

* The plaintiff must prove that he has given or used due diligence to give notice of dishonour. As to what will be proof of notice or due diligence, see *ante*, 553.

† The protest, we have seen, is made out by a notary public, if there be one in the neighborhood; if not, by an inhabitant of the place where it is made, in the presence of two witnesses, but the witnesses need not be called, its mere production being sufficient proof. As to when a protest is necessary, see *ante* p. 486.

the drawer* that the plaintiff in this suit being the first indorsee of a bill payable to the maker's own order, was the same as payee. See 2 B. & P. 78; 2 Campb. 186.

(b) *Affidavit to hold to bail.* See *ante*, vol. i. from 406 to 410.

(c) *Arrest.* See *ante*, p. 505.

(d) *Bail.* See *ante*, p. 506.

(e) *Declaration.*

1st. *Of the count stating the bill or note*; and see *ante*, p. 508.

1. CHATERS v. BELL. T. T. 1802. N. P. 4 Esp. 210.

The declaration stated that the bill was drawn payable to C, by him indorsed to the defendant, and by the defendant to the plaintiff. There were in fact, several intermediate indorsements between C. and the defendant, which were omitted in the declaration; and it was contended, that the plaintiff should have either declared as the immediate indorsee of the payee, or have stated all the indorsements; but Lord Ellenborough overruled the objection.

2. LEVY v. WILSON. M. T. 1804. 5 Esp. 180.

Action by indorsee against drawer. The declaration stated that the defendant had drawn the bill payable to M. J.; and that the latter had indorsed it, "his own hand writing being thereunto subscribed." On the production of the bill, it appeared to have been indorsed by procuration. It was objected, that this was a fatal variance, although had it been stated generally that he had indorsed it in writing, it was admitted that it would have been consistent with the indorsement by procuration. This doctrine was admitted by Lord Ellenborough to be correct; and the plaintiff was nonsuited.

3. HELMSLEY v. LOADER. E. T. 1810. N. P. 2 Campb. 450.

Assumpsit on a bill of exchange. The declaration stated the bill to be drawn by A., payable to his order, and that he indorsed it to plaintiff, "his own production per hand being thereunto subscribed." It appeared in evidence that the bill was indorsed by A.'s wife. Defendant with a knowledge of this circumstance, promised to pay plaintiff the bill. Lord Ellenborough said he thought it would be sufficient to show it was indorsed by plaintiff's authorised agent; but at all events, defendant could not now object, after a promise to pay with a knowledge of all the circumstances. Verdict for plaintiff.

4. SMALLWOOD v. VERNON. M. T. 1735. K. B. 1 Stra. 478.

In an action on the case by original in this court. the plaintiff declared against the defendant, as indorser of a promissory note; and after setting out the note and indorsement; he goes on, that by virtue thereof, the defendant became chargeable with the payment of the money, according to the tenor of the indorsement. The defendant, on oyer of the original, pleads in abatement that the charge against him ought to be according to the tenor of the note, and not of the indorsement; and the defendant's counsel insisted that it might be that the indorsement appointed the money to be paid at a different time from what is mentioned in the note, which are terms that the indorser cannot lay on the party who made the note. *Per Cur.* There is no occasion to pray in aid of that objection here, where the action is against the indorser; it is true he cannot lay a charge on the giver of the note in a manner different from the terms of it; but he may charge himself if he pleases, for every indorsement is the same as making a new note; and if the note is payable the first of May, and the indorsement appoints it to be the first of April, as to the indorser this is a promissory note, payable on the 1st of April. If this was an action against the giver of the note, there might be more in the objection. Let the defendant answer over. See *Strange*, vol. i. p. 478.

5. SKIP v. HOOK. H. T. 1737. C. P. 2 Com. 563.

Defendant in *assumpsit* on a note by the defendant to pay W. W., or order, 50l. for value received, alleging that W. W. indorsed the note to the plaintiff; be liable in consideration whereof, the defendant promised to pay to the plaintiff, who, according to

* Or it seems against the indorser of a note; *Bishop v. Young*, 2 B. & A. 78. abridged the tenor of *ante*, vol. ii. p. 414; *Welsh v. Craig*, 1 Stra. 680; S. C. 8 Mod. 173. observed on in *Bishop v. Young*.

† It is usual to insert two counts, one including all the indorsements, the other merely making the plaintiff the immediate indorsee of the payee.

though often requested, refused, &c. Demurrer; assigning for cause, that the declaration did not aver notice to the defendant of the indorsement. In support of the demurrer, *Lawrence v. Jacob*. 8 Mod. 43 was cited.

Sed per Pur. The case referred to is misreported, for *Fortescue J.* produced the paper book in that case, and said it was E. T. 8 Geo. and that the judgment was affirmed; and on the authority of that case, and on the reason of the thing; for the defendant by his demurrer admits, that in consideration of the premises, viz. the defendant's making the indorsable note, and the indoring of it to the plaintiff's, the defendant assumed to pay the money according to the tenor of the note.—Judgment for plaintiff.

6. *BILSON v. HILL*. H. T. 1734. K. B. 7-Mod. Rep. 198.

Writ of error in *assumpsit*, brought on a note by the indorsee against the indorser. It was objected, that no default of payment by the drawer upon application to him was laid in the declaration.

Per Cur. There is an express promise of payment to the indorsee laid in the declaration: the other is only matter of evidence.

7. *JONES v. MORGAN AND ANOTHER*. T. T. 1810. N. P. 2 Camp. 474.

Action on a bill of exchange drawn and indorsed by defendants to plaintiff. The declaration, it appeared, stated unnecessarily that one A. had accepted the bill. Evidence of defendant's promise to pay was given, but not of his hand-writing; and the question was, whether, under such circumstances, it was necessary to prove the acceptance.

Per Cur. The promise to pay by the defendant is sufficient to render proof of acceptance unnecessary.—Verdict for plaintiff.

one A. accepted a bill of exchange, instead of that it was drawn upon one A. is cured by defendants promise to pay and such acceptance need not be proved.

8. *PATTERSON v. BECHER*. M. T. 1821. C P. 6 Moore. 319.

Declaration on a bill of exchange stated that the defendant on, &c. at St. Helena, to wit, at, &c. in the colony, &c. drew a bill of exchange, and directed it to A. B. and Co., London, and thereby required them, after sight, to pay the sum of, &c. to the plaintiff, or order, value received. Averment, that the bill was, when due presented for payment, and that such payment was refused, whereon the defendant's liability arose. The bill was not stamped, but the plaintiff gave evidence of a promise to pay made by the defendant's attorney, in a conversation which he had with the plaintiff's attorney subsequently to the dishonour, but which the attorney swore was made without prejudice; and produced a letter written by the attorney after the commencement of proceedings, and the promise as stated, and stating that he had conferred with the defendant since the conversation stated, and now, on his behalf, proposed to give a warrant of attorney for the amount, payable, &c. It was contended on the defendant's part, that if the bill was to be considered as a foreign bill, it should have been stated to have been drawn in parts beyond the seas; as in consequence of such omission, the defendant, not knowing the nature of the bill, was deterred from objecting to a want of protest for non-payment; and if it was to be viewed as an inland bill, it was invalid without a stamp. The plaintiff's counsel urged, that the plaintiff could not at this time avail himself of such defect, if any, as he had waived his right by the subsequent promise and letter. For the defendant it was denied, that the plaintiff could take advantage of the letter, as, from the circumstances attending it, it was evidence that it had reference to the conversation, and was written with a view to accommodate matters, and was, therefore, intended to be without prejudice. The plaintiff had a verdict, open to a rule nisi by the defendant to set it aside. Such rule was obtained.

Per Cur. Though the defendant's attorney has stated that if, during the conversation that took place, any offer was made as stated, it was made without prejudice, neither he nor the defendant attempt to deny the justice of the plaintiff's demand. It is clear, that a promise to pay made subsequently to the dishonour of a bill, will waive defects in the regular method to obtain payment; but what will constitute such a promise must be collected from circum-

And in an action against the maker of a note, the plaintiff need not allege that the former had notice of the indorsement.

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A declaration by the indorsee of a note against the indorser, is good, without stating the default of the maker. A declaration stating unnecessarily that

Where, in an action against the drawer of a bill of exchange, it appeared that subsequently to its dishonour, the defendant promised payment, and that a letter was written by the defendant's attorney to the plaintiff's attorney to that effect the Court held that the defendant could not take objection to a defect of pleading, in not averring a protest for non-payment.

An indorsee may recover under the count for money lent against the indorser.* But in an action by indorsee against maker of a promissory note, if no evidence of indorsement is offered, indorsee cannot recover on a count for [565] money had and received, there being no privity between the parties. In order to rebut a defence by the indorser of a bill, that the plaintiff's indorsee had not duly presented it to the acceptor, evidence of the impossibility of presenting it at the time of its maturity may be given on the ordinary averment that it was duly presented. If notice of a bill of exchange being dishonoured be not given to an indorser of it, and after wards he enters into an agreement to pay the a

stances; and from all the facts, we are of opinion, that if the promise stated was insufficient, the letter fully supplied the deficiency.—Rule discharged.

2d. *Of the money counts.*

1. *KESSEBOWER v. TIMS.* E. T. 1749. K. B. Cited Bayl. 288.

Lord Kenyon held that the indorsee of a note might maintain *indebitatus assumpsit* for money lent against the person who indorsed it to him.

2. *WAYNAM v. BEND.*—H. T. 1808. N. P. 1 Campb. 175.

In an action by the indorsee against the maker of a promissory note, in which no evidence of the indorsement was given, plaintiff insisted he could recover under a count for money had and received; but Lord Ellenborough said he could not, as he was not an original party to the bill.

(f) *Pleas.* See ante, p. 528.

(g) *Of paying debts and costs.* See ante, p. 527.

(h) *Evidence.*

1st. *Of producing the bill or note.* See ante, p. 536.

2d. *Of proving that the bill or note corresponds with the instrument described in the declaration.* See ante, p. 536.

3d. *Of proving the indorsement.* See ante, p. 539.

4th. *Of proving the presentment.* See ante, p. 539.

PATIENCE v. TOWNLEY. T. T. 1805. K. B. 2 Smith. Rep. 223.

The defendant, an indorser of a bill of exchange, in an action brought against him by his indorsee, contended that he was absolved from all responsibility on account of the laches of the plaintiff, he not having presented the bill to the acceptor, either for acceptance or payment, until the lapse of a considerable time after it had become due. The plaintiff, however, in the evidence which he brought forward on the trial, established the complete impossibility of a presentment being made on account of the warlike enmity that had subsisted between the two countries in which the bill was drawn and made payable. A verdict was recorded for plaintiff. A new trial was now moved for, when it was urged that such evidence had been improperly admitted in support of the general averment in the declaration that the bill had been duly presented; and that the special circumstances upon which the plaintiff rested his case, should have been disclosed. The Court, however, did not confirm the cogency of these arguments, but, on the contrary, refused the rule.

5th. *Of proving the notice of dishonour.* See also ante, p. 559 & 453.

GUNSON v. METZ. H. T. 1823. K. B. 1 B. & C. 193; S. C. 2 D. & R. 334.

Declaration; *assumpsit* on a bill of exchange, dated 18th Sept. 1816, for 160*l.* payable 12 months after date, drawn by the defendant, accepted by A. B. and indorsed to C. D. and by him indorsed to the plaintiff. Plea, *non assumpsit*. It was proved that when the bill was presented, upon its becoming due, it was dishonoured; that the plaintiff being ignorant of the residence of the defendant, could not give him notice of the non-payment; that after the bill had become due, on the 15th day of May, 1818, C. D. and the defendant entered into an agreement, in which it was recited, that the defendant having drawn and indorsed several bills of exchange, naming them, and mentioning the bill in question, "which said bills of exchange being all of them over due," he undertook to pay 1*l.* per week until the whole demand was fully paid and satisfied. It was objected that no notice of non-payment had been given to the defendant, to which it was answered, that the acknowledgment of the bill being over due, and the promise to pay it contained in the agreement between the defendant and C. D., waived that irregularity. The objection was overruled, and the jury found their verdict for the plaintiff. A motion was now made for a rule nisi to set aside that verdict, and to have a nonsuit entered, or new trial granted. The same objection was advanced as was made at the trial;

* For the indorser, when he receives the money from the indorsee, holds it in trust to be re-paid to the holder, if he shall fail to obtain it from the acceptor or maker after using due diligence and giving proper notices. He indorses it with his name in order to give it credit, and his signature cannot have that effect, unless it is taken as the sign of an express contract to pay the money to the holder.

and it was contended, that the agreement was only a waiver of notice of the dishonour as between the parties to it, but could not help a third party, and that the promise to pay had in all similar instances been made to the holder. *Per Cur.* The agreement, which must be viewed as though it related only to the particular bill, is evidence of notice of the bill being dishonoured. The defendant knows that the bill is over due, and yet he promises to pay it, which circumstance raises a strong presumption that he had notice; for if he had not, then he might have said, "C. D. I have not had notice, and I am discharged; but if you are called on to pay it, then I will repay you;" but he on the contrary promised to pay C. D.; and if he is liable to C. D. then he is liable to the holders of the bill, the present plaintiffs.—Rule refused. See 1 Holt. N. P. C. 550. cont. 569.

6th. *Of proving the protest.* See ante, p. 561.

7th. *Of proving the consideration.* See ante, p. 325 & 552.

8th. *Of proving the payment.*

ELMES v. WILLS. T. T. 1788. C. P. 1 H. Bl. 64.

In an action by the indorsee against the drawer, the declaration contained the common counts. On the general issue pleaded, it appeared that on a settlement between plaintiff and defendant, the latter said he could prove he had paid this bill, and it was agreed the bill should be deposited in the hands of a third; and if the defendant brought proof of payment within a month, it was to be delivered up to him; and if not, he promised to pay it to the plaintiff. No proof being brought within that time, the bill was delivered to the plaintiff, who brought this action. At the trial the defendant offered to prove that the debt was paid for which the bill had been given, and that he could not find the witness within the month, by whom he could have proved the payment. Gould, J. rejected the evidence; and on motion for a new trial he retained his opinion against the other three judges, who were of opinion that the evidence ought to have been admitted to prove that the debt for which it was given had been discharged.—Rule absolute.

9th. *Of the competency of witnesses.*

1. HART v. McINTOSH. H. T. 1795. C. P. N. P. 1 Esp. 298.

Action by the indorsee against the defendant as drawer; defence, that the notes arose out of an illegal transaction, to prove which, the indorser was called. An objection being taken to his competency, on the ground that his name appeared on the note as indorser, the case of *Walton v. Shelly*, 1 T. R. 296. was relied on as authority to show that any person whose name appeared on the bill, was competent to prove its illegality. But Fuller, J. said, as a different rule has always obtained in the Common Pleas, he should reject the witness.

2. JORDAINE v. LASHBROOKE. E. T. 1798. K. B. 7 T. R. 601.

In an action on a bill purporting to have been drawn at Hamburg, the defence was, that it was drawn in London, and therefore inadmissible in evidence without a stamp; the payee and indorser was called to prove where it was drawn, but it was objected that he was incompetent. Lord Kenyon, however, admitted him; and on his testimony, the defendant had a verdict upon the counts on the bill. On a rule nisi for a new trial, and cause shown, Ashurst, J. thought the witness inadmissible; but Lord Kenyon, Grose, and Lawrence, Js. held that as he was neither interested in the event, nor rendered infamous by a conviction for any crime, he was properly admitted.—Rule discharged.

3. SHUTTLEWORTH v. STEPHENS. T. T. 1808. N. P. 1 Camp. 407.

Action by indorsee against the drawer of a bill, drawn without consideration. The payee was called, who stated he indorsed the bill to plaintiff, before it became due, in payment of goods sold. The witness was objected to, as being interested, inasmuch as if the plaintiff could not sue the defendant, he might be the witness; but Lord Ellenborough said, the event was immaterial to the witness, because he was liable either to plaintiff for goods sold, or to defendant for money paid.—Verdict for plaintiff. See *Maundrell v. Kennet*, G. H. H. T. 1809; and *Chitty on Bills*, 2d edit. 282, 3, 4.

meant of it to his immediate indorsee, such agreement [566] is evidence of his having had notice so as to make him liable to be sued by the holder of the bill. A promise by the drawer of a bill to discharge it, unless, within a fixed time, he can show that he has already paid it, is not binding, if he can show that it has been paid though he fail in adducing the necessary proof within the time appointed. A person who has indorsed a bill, is not a competent witness [567] to impeach the security to which he has given credit. But a different rule holds in the King's Bench. So the indorser is a competent witness to prove the consideration.

So an indorser is competent in an action by the holder against the drawer to prove the payment by the drawer of money into his hands, to take up the bill, and that he has satisfied the bill; for he is liable at all events, either to the holder or to the drawer for the amount of the bill.

So the acceptor is a good witness to prove that he had no effects in the hands of the drawers.

But where a defendant has given a bill as a security for a debt from A. B. to the plaintiff, A. B. is not a competent witness for the debt.

4. *BIRT AND OTHERS, ASSIGNEES, &c. v. KERSHAW.* T. T. 1802. K. B. 2 East. 458.

The defendant drew a bill in favour of A., which A. indorsed to B., whose assignees now sued the defendant on the bill. The defendant called A. to prove that he had paid the bill to B., and had been reimbursed by the defendant. It was objected that A. (who had no release from the defendant) came to discharge himself, and was therefore interested. His evidence, however, was received, and a verdict found for the defendant. And on rule nisi to set it aside, and cause shown, the Court was clearly of opinion, that this testimony had been properly admitted; that this case fell directly within the principle of *Ilderton v. Atkinson* (7 T. R. 480.) in which it was holden, that a witness to whom the defendant had paid 200*l.* on account of the plaintiff, was a competent witness for the defendant, to prove that he was the agent of the plaintiff, when he received the money, although it was objected, that if the plaintiff succeeded, he would be liable to the defendant for the costs of the action;* that the witness stood indifferent; and the Court observed, Consider the situation of the witness, without his being an indorser on the bill. He admits that he has received from one man a sum of money for a debt which he owed to another, in order to pay it over to that other. It is clear, then, that he must be liable either to the one or the other; and if the original debtor obtain a verdict, by means of his evidence, he will be liable to be sued by the creditor for whose use the money was received; and the verdict in this case will be no evidence of the payment for him in the other. Then, how does it alter his situation, that he is upon the bill. If the plaintiffs do not recover now, they may sue him on the bill; and if they do recover, then, by his own account, he is answerable over to the defendant. It is true, that in the latter case, if these plaintiffs recover, he may also be liable to the defendant for the costs of this action; but that argument was urged in *Ilderton v. Atkinson* without effect.—Rule discharged. See *Evans v. Williams*; cited, 7 T. R. 481.

5. *STAPLES v. OKINES.* E. T. 1795. K. B. N. P. 1 Esp. 332.

Action by the indorsee against the drawer. Defence, want of notice of non-payment. To supercede the necessity of giving notice, the plaintiff called the acceptor, to prove that when the bill was drawn, the drawer had no effects in his hands. On an objection to his competency, Lord Kenyon, C. J. held his evidence admissible.

6. *BOTTOMLEY v. WILSON.* T. T. 1822. K. B. 3 Stark. 148.

Indorsee against indorser of a bill. The bill, it appeared, had been given as security for a debt from A. B. to plaintiff. A. B. was called as a witness for the defendant. It was objected, that he was incompetent, on the ground that he would be liable to the defendant if the plaintiff succeeded. Abbott, C. J. said he was an incompetent witness.

In the case of *Ilderton v. Atkinson*, the Court seem to have relied principally on the ground that the witness was competent as an agent to prove a fact done in the course of his agency; for they observed, that if such an objection were to prevail, it would exclude brokers who had effected policies of insurance. And as indeed it would be difficult to support upon principle the position that the getting rid of a legal liability to the costs of an action did not disqualify a witness, the decision in the case of *Birt v. Kershaw*, above abridged, can only be upholden upon the consideration, that as a mere indorser the witness was competent, and that as the mere agent of the drawer, in paying the money over to the holder of the bill, he was also competent to prove such payment, according to the general rule as to the competency of agents. In strictness, the objection to his competency rested on his liability to the drawer for the consequence of his negligence, in having paid over the money, which was wholly independent of his being a party to the bill; if he had been a mere stranger to the bill, but employed as agent to pay over the money, the same objection might have been taken and overruled on the ground of the general competency of an agent. But since the recent case of *Jones v. Brooke*, 4 Taunt. 464. abridged p. 553. this question would, it is proved, receive a different construction. That was an action against the acceptor of a bill, accepted for the accommodation of the drawer. The Court of Common Pleas held that the drawer was not a competent witness for the defendant to prove that the holder received the bill on an usurious consideration, on the ground that he was bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and would, therefore, be liable to the acceptor, not only for the prin-

- (i) *Sum Recoverable.* See *ante*, p. 540.
 (j) *Judgment by default.* See *ante* p. 530.
 (G) BY DRAWER AGAINST ACCEPTOR OF A BILL.

(a) *Form of Action.*

PRIDDY v. HENREY. E. T. 1823. K. B. 1 B. & C. 674.

Declaration in debt; that the defendant was indebted to the plaintiff in the sum of 50*l*. on a bill of exchange, drawn on the defendant, payable two months after date to the plaintiff or order, for 50*l*. for value received in goods, which the defendant had accepted. Demurrer, and joinder in demurrer. In support of the demurrer it was said, that the question raised was, whether or not an action of debt would lie on this bill of exchange by the drawer against the acceptor. It was contended that it would not; because such an action had never been heard of, and would be founded on the fallacy, that the acceptance created a debt; whereas, the acceptor merely gave a collateral security, that he would be responsible, if the other parties to the bill did not pay; that Milton's case, (Hardres, 485.) was an express authority in his favour; and that, in fact, the man who draws a bill of exchange is in general, the debtor, and so continues until it is paid. (Brown v. London, 1 Mod. 285; 2 Keb. 695. 713. 758. 812. Hodges v. Steward, Skin. 322. 346. Gilbert on Debt, 364; Webb v. Geddes, 1 Taunt. 540. Bishop v. Young, 2 B. & P. 78; and Comyn's Digest, tit. Debt.) On the other side, it was urged for the plaintiff that the words of the bill "for value received in goods;" showed the consideration for which it was given; and that the case of Highmore v. Primrose (5 M. & S. 65.) proved that those words must mean value received by the acceptor, from the drawer, and thus there was a privity between the drawer and the acceptor, and therefore the case of Stratton v. Hill, (3 Price 253) was an authority that an action of debt would lie. *Per Cur.* In this case the plaintiff is the drawer of a bill of exchange of which the defendant is the acceptor. It purports to have been drawn "for value received in goods." Now, "value received," means value received by the acceptor from the drawer; and the question for our consideration is, not whether the action of debt will lie in general by the drawer against the acceptor, but whether it may be brought if the bill be for value received by the acceptor; and we are of opinion that it may be maintained. In all the cases which have been so ably urged on behalf of the defendant, there was not any privity of contract between the parties, and it was impossible to presume any; and certainly, without some direct privity between the parties, a debt could not be supposed to exist. Thus Milton's case, and Browne v. London, were brought by payees against the acceptors of bills drawn by third persons. The dictum of Lord Holt, in Hodges v. Steward, is more in favour of the plaintiffs than the defendant, where he says, "In this case it was often said, that *indebitatus assumpsit*, would not lie upon a bill of exchange, as it had been ruled in divers cases; but against a drawer, for value received, there it would lie; but there it is for the apparent consideration." Although in Webb v. Geddes the plaintiff was in all probability, the payee and drawer, yet this question did not come directly before the Court; for the point then to be determined was, whether bail in error could be required. On the other hand there are many cases from which, by analogy, it may be inferred, that the action of debt will, under the circumstances of this case, lie by the drawer against the acceptor. They are chiefly on promissory notes, where it has been held, that the payee may maintain an action of debt against the maker, as in Rumball v. Ball 10 Mod. 38; and Bishop v. Young, ante, vol. ii. p. 414. In the latter case

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it was expressly laid down by Lord Eldon, that where a note expressed a consideration upon the face of it, a privity existed between the parties, a duty or debt was created, and on it the action of debt could be maintained. In what does the difference between this case, and that of *Fishop v. Young* consist? The one acts of his own accord, the other on request. There is not in law any difference. The principles on which that case was decided, must determine this one. In both instances the debtor undertakes not for the debt of a stranger, but for his own. There is the same species of privity between them. But the reasoning in *Stratton v. Hill* is still more conclusive. That was an action of debt by the indorsee against the immediate indorser, who was the drawer of the bill of exchange. The principal of that decision was the privity between them. It was taken for granted that a debt existed. If then an action of debt would lie, where the debt was raised by presumption, it must, *a fortiori*, lie, when the defendant himself says that he has received the value of the bill in goods. Judgment for the plaintiff.

(b) *Affidavit to hold to bail.* See vol 1 from 406 to 410.

(c) *Arrest.* See *ante*, p. 505.

(d) *Bail.* See *ante*, p. 506.

(e) *Declaration.*

1. *Of the count stating the bill or note.* See *ante*, p. 508.

In an action against the acceptor of a bill of exchange drawn by plaintiff to his own order, the acceptance is evidence of [571] money received to the use of the plaintiff.*

THOMPSON AND ANOTHER V. MORGAN. M. T. 1811. N. P. 3 Camp. 101.

Action by the drawer against the acceptor of a bill of exchange for value, payable to plaintiff's order. In the course of the trial it was objected, that a variance between the special count, and the terms of the bill could not be offered in evidence under the money counts, on the ground that an *indebitatus assumpsit* would not lie against the acceptor of a bill of exchange; the learned counsel for the plaintiffs contended, there was this manifest distinction between the two cases, the objection taken only applies where there are three parties to the bill, and the action is brought either by payee or indorsee; the law in such cases considers the original money transaction as between the payee and drawer; the latter is presumed to have received the value; the acceptor being a mere surety, there is no transaction between him and the payee; but in the case before us there are only two parties, the drawer and payee being one and the same person; consequently it must be treated in this peculiar transaction as a promissory note, which is held to be good evidence to support a count for money lent, had, and received, and account stated. Lord Ellenborough admitted the bill as evidence under the count for money had and received; but would allow no interest.

(f) *Pleas.* See *ante*, p. 528.

(g) *Paying debt and costs.* See *ante*, p. 527.

(h) *Evidence.*

In an action by the drawer against the acceptor, the acceptance need only be proved, unless the bill has been negotiated, in which case evidence must be adduced of the presentment for payment, the dishonour of the bill, and the payment of the bill by plaintiff; and the payment may be proved by the payee or indorsee who returned the bill. As to proving the acceptance, see *ante*, p. 536; and presentment, see *ante*, p. 357 and 432.

* But the drawer of a bill, payable to a third person, cannot recover upon the count for money paid to the acceptor's use, without proof of a consideration between him and the acceptor. In the case of *Cowley v. Dunlop*, 7 T. R. 572. Mr. Justice Lawrence, with reference to such a case, said, "In short, the question comes to this, whether the drawer of a bill of exchange, who is obliged to take it up, after having negotiated it, is not confined to his action on the bill to recover against the acceptor. And it seems to me that he is, for I see no reason to raise an implied *assumpsit*, as for money paid by the drawer for the acceptor, when the contract, arising out of the bill, and the custom are fully sufficient to enable him to recover what he may be obliged to pay on the acceptor's refusal." And it seems doubtful, whether the drawer can recover on the common count, for money had and received, without proof of a consideration passing between the parties; *Thompson v. Morgan*, 3 Camp. 101; *Scholey v. Walsby*, Peak, 24.

(H) ACCOMMODATION ACCEPTOR AGAINST DRAWER.

1. *HARDGATE v. NETHERWOOD*. M. T. 1821. K. B. 5 B. & A. 93. Where an action is brought by an accommodation acceptor of a bill against the drawer for a breach of promise to provide funds when it should become due, the Court will not permit the defendant to set up any counter claim.
Assumpsit, in consideration that the plaintiff, for the accommodation, and at the request of the defendant, would accept certain bills of exchange, and deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage; by reason whereof the plaintiff, as acceptor, was forced and obliged to pay the holders of the bills certain sums of money, with interest, charges, and expences. Plea, *inter alia*, of set-off. Demurrer, and joinder. It was contended for the plaintiff, that the set-off could not be sustained, and observed, that a set-off could not be pleaded to a declaration on a contract upon which the plaintiff might be entitled to recover unliquidated damages; and that he must therefore give judgment for plaintiff, as the jury, in the case before them, might award damages for the manner in which the plaintiff had been forced and compelled to pay the amount of the bills; although, they said, that the set-off might have been good, if pleaded only to that part of the count charging the defendant with the amount of the acceptances paid by the plaintiff.

2. *BUCKLER v. BUTTIVANT*. M. T. 1802. K. B. 3 Fast. 72.

The defendant gave the plaintiff his bill, accepted by third persons, in exchange for the plaintiff's acceptances of bills drawn by the defendant on him. Each bill tallied in the amount with that for which it was exchanged, excepting that; in one instance, two bills were given in exchange for one of the agreed amount of both; and in an other instance there was a difference, between the bills exchanged, of a few shillings, which were paid at the time, in order (as it was expressed) "to finish the transaction." They also agreed in dates, excepting that, in two instances, bills were made payable two days earlier than those for which they were respectively exchanged; and the defendant's letters in which they enclosed their remittances, always spoke of "valuing" on the plaintiff "for the same amount;" and the whole correspondence pointed at nothing else than an exchange of paper. In some of the letters from the defendant to the plaintiff, there was, however, the following expression; "Agreeable thereto we now inclose certain bills (setting them out,) to which you will procure acceptances, and credit us against the following drafts we value on you (setting out the drafts,) to which we request your protection, &c." The defendant became bankrupt. When the commission was issued, the plaintiff had paid the whole amount of his acceptances to the holders, excepting 49*l.* and he proved the money so paid under the commission. He afterwards paid the balance of 49*l.*, and brought this action for money paid, to recover that sum. All the bills received by the plaintiff from the defendant were dishonoured. A verdict was found for the plaintiff, subject to the opinion of the Court. *Per Cur.* It has been argued, that the transaction was not a case of mutual accommodation, but one of principal and agent, or, more properly speaking, principal and surety. And reliance has been principally had on an expression in defendant's letter, that the plaintiff would procure the acceptances of certain parties; as if it were to be understood, that the plaintiff was desired to pledge his own credit with those persons, in order to induce them to lend their acceptances. Put clearly that is not the fair result, looking at

Where two parties exchanged acceptances of bills of exchange, the different sets of which tallied in the gross amount except in one instance, to the amount of 5*s.* 4*d.* which was paid at the time, in order, as was said to finish the transaction, the Court held that one of such parties having paid the remaining due after the bankruptcy of the other

† A contract by the drawer to indemnify a party who has accepted a bill for his accommodation is implied; see *Precedents*, Petersdorf's Index, and Wils. 346; 2 T. R. 35; 7 T. R. 568; 2 B. & P. 268; and when such acceptor has actually paid the money, a common count for money paid is sufficient; but when he has not actually paid the debt in money but has only given security for it, or he has sustained any expense for costs or damages, had been the declaration should be special; 3 East 169; 8 T. R. 610; 7 T. R. 204; 11 East 52; dishonoured and other cases cited Petersdorf on Bail, 21. *et seq.*

der whose commission the former had proved *pro tanto*, could not sue the latter for such balance, the Court holding that each party was confined to his remedy on the securities exchanged.

Bill accepted by A. for B.'s accommodation is sent to C. B.'s banker, on account; when the bill became due, the balance is in favour of B.; the bill remains, and the balance afterwards turns in favour of C., held that A. is liable to C. on the acceptance.

Evidence.
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A prior indorser can not sue a subsequent one.

Upon special demurrer to a declaration by a plaintiff who had paid the bill for the honour of one of the indorsers, alleging, "that the plaintiff, according to the usage

the whole transaction. The plaintiff was not to procure those acceptances by pledging any credit of his own, but on the sole account of the defendants; the real transaction being, that those acceptances were to be obtained by the defendants, of their friends, in exchange for the plaintiff's own acceptances. The acceptances thus interchanged tallied, in effect, in their respective amount, the difference being only a few shillings, which was considered as the immediate debt of the defendant, against whom that excess was, and which he provided for at the time. If, then an express agreement between these parties to that effect is to be collected, that excludes all implied considerations. There was no promise of indemnity, on either side, in case their respective acceptances were not provided for, but each party was to look to the liquidation of his claim on the other bills which he took in lieu of his own, and his remedy thereon, and to those only. This action, therefore, which is founded on an implied promise, and not on the bills, cannot be supported.—*Postea* to defendant. See 3 Wils. 13. 346; 1 H. Bl. 640; 2 id. 570 2 T. R. 100. 640; 4 id. 714; 7 id. 364. 568; 4 Ves. jun. 373.

3. ATWOOD v. CROWDIE. M. T. 1816. N. P. 1 Stark. 483.

Action by indorsee of a bill of exchange against acceptor. It appeared the defendant lent his acceptance to one A., payable to A.'s order. The bills so accepted were sent to A.'s bankers as a security; when the bills became due, the balance of accounts was in favour of A.; but A. having failed, the balance turned in favour of plaintiff; upon which he sued defendant on the acceptances. Defendant's counsel contended, that as the balance was in favour of A. when the bills became due, they must be considered as satisfied; or, at all events, plaintiff must stand in the same situation as if the bills had been indorsed to him after their maturity. But Lord Ellenborough said, it appeared they were sent *on account*, by which term is meant the floating account. The bills might have been reclaimed when plaintiff's lien ceased; but by allowing them to continue in plaintiff's hands until the balance turned against A., the plaintiff's lien reverted.—Verdict for plaintiff.

4. In an action by the accommodation acceptor against the drawer, he must prove the drawing by showing that the signature to the bill is the defendant's handwriting, the rebuttal of the presumption of consideration, and the payment. The mere production of the bill will not afford even *prima facie* evidence of payment, without showing that the bill has been in circulation since the acceptance; and payment is not to be presumed from a receipt indorsed on the bill, except it be in the handwriting of some person entitled to demand payment; see *Pfiel v. Vanbasenburgh*, 2 Camp. 439. abridged *ante*.

(I) BY A PRIOR AGAINST A SUBSEQUENT INDORSER.

BISHOP v. HAYWARD. M. T. 1791. K. B. 4 T. R. 470.

Declaration on a promissory note made by C., payable to the plaintiff, and afterwards indorsed by him to the defendant, who afterwards re-indorsed it to the plaintiff. After verdict for the plaintiff on the general issue, the Court arrested the judgment, because he had not shown sufficient, on his own stating of the case, to entitle him to recover against the defendant. Here the plaintiff, being the original indorser, calls on the defendant, who appears, on the record, to be a subsequent indorsee; and nothing can be clearer in law, than that an indorsee may resort to either of the preceding indorsers for payment, whereas the plaintiff's action was an attempt to reverse this rule. The plaintiff stated facts in his declaration subversive of his own title. See *Mainwaring v. Newman*, 2 B. & P. 125.

(J) BY A PARTY WHO HAS PAID A BILL SUPRA PROTEST.

See *ante*, 449.

COX v. EARLE. II. T. 1820. K. B. 3 B. & A. 430.

Declaration against acceptor on bill paid by plaintiff, under protest, for the honour of the second indorser, stated, that plaintiff, according to the usage and custom of merchants, paid the bill under protest. Special demurrer, on the ground that it was not alleged to whom plaintiff paid it, or that he paid it to the holder, or that plaintiff thereby became the legal holder thereof. *Sed per*

Cur. Payment to a wrong person would be no payment. This payment is alleged to have been made according to the usage and custom of merchants; and if an issue were taken on the fact of payment, plaintiff would be bound to prove payment to the person entitled to receive. In *Lewin v. Brunette*, (Lutw. 899.) there was no such averment.—Jungment for plaintiff.

XVIII. EXECUTION.

See *ante*, div. Parties how discharged; Extinguishment and Satisfaction; and tit. *Fieri Facias*.

1. *WINDHAM v. WITHER*. E. T. 1721. K. B. 1 Stra. 515.

The plaintiff brought two actions upon a promissory note, one against the drawer, and another against the indorser, and recovered in both. On motion, that, on payment of the principal and costs in both actions, execution might be staid, the Court made the rule absolute, and said, that the plaintiff would have had no right to have taken execution against both. See 2 Show. 441; 3 Mod. 86; Skin. 255.

2. *POLE v. FORD*. M. T. 1816. K. B. 2 Chit. Rep. 125.

The plaintiff having proceeded against the acceptor and drawer, and having obtained judgment against each, and sued out a *feri facias* against the former, and taken his goods in execution, which he afterwards abandoned, and gave time to acceptor by receiving from him another security, the drawer applied for leave to enter satisfaction on the roll.

Abbott, J. entertained great doubt, and granted a rule nisi. But on showing cause, the Court were of opinion, that the withdrawing the *feri facias* against the acceptor did not discharge the drawer.

3. *HAYLING v. MULLHALL*. M. T. 1778. C. P. 2 Blac. 1235.

A bill was indorsed by A. to B., and by B. to the plaintiff, who sued A. to execution, but afterwards let him out on a letter of licence, without paying the debt. He then sued B., for whom the defendant became bail; and B. not paying, this action was brought against the defendant, who insisted the debt was discharged by the imprisonment of A. But the Court said, each indorser is independent of the rest, and the bill-holder has a right to sue all the indorsers till the bill is satisfied. The satisfaction by imprisonment is only a discharge of the identical person so imprisoned; it does not even discharge his goods after his death, since the statute of Jac. 1., much less any other person.

XIX. REMEDY UPON BILLS AND NOTES IN CASE OF BANKRUPTCY.

As to the Petitioning Creditor's Debt, see *ante*, vol. iii. p. 566. As to proving Bill and note, see *ante*, vol. iii. p. 633.

XX. REMEDY UPON BILLS AND NOTES IN CASE OF INSOLVENCY.

See tit. Insolvent Debtor.

Birmingham Court of Requests. See tit. *Court of requests*.

Bishop. See tit. *Ecclesiastical Persons*.

Bishops Institution Book.

TILLARD v. SHERBEARE. M. T. 1767. C. P. 2 Wils. 366.

After verdict for the plaintiff on a *quare impedit*, upon motion for a new trial, the question was, whether the copy of an entry of an institution in the Bishops' Institution Book was evidence admissible, and sufficient to prove a presentation by the patron to the living. It was objected for the defendant, that the presentation under the hand and seal of the patron ought to have been produced; or, upon evidence that a proper search had been made for the presentation itself, and that it could not be found, then the Bishop's Institution Book itself, which is the next best evidence, ought to have been produced; but neither of these things have been done. For the plaintiff it was said, the Court will not grant a new trial on a *quare impedit*, because the plaintiff can recover no costs nor damages, more than half a year's value of the benefice; where-

and custom of merchants, paid the bill up, on protest, held not necessary to state that the party to whom the payment was made was the party having title to the bill.

[575] The plaintiff can only have an effectual execution against one of several parties to a bill.

But a *feri facias* being sued out, and afterwards waived, does not discharge other parties.

So the actual taking of a man in execution, and discharging him upon a letter of licence, is no discharge as to any of the antecedent parties.

[576] A copy of an entry of an institution, in the Bishop's Institution Book, is not evidence sufficient to prove a presentation by the patron to the living.

upon the counsel for the defendant proposed to pay the plaintiff costs, and to account for the profits of the living, in case there should be another verdict against the defendant.

Per Cur. There must be a new trial. The true point is, might not the plaintiff have produced better evidence? He has neither produced the presentation, nor shown that he hath made a proper search for it, and that it could not be found. Besides, the Bishops' Institution Book might have been produced, which would have been better evidence than a copy of it.

Black. See tit. *Cattle; deer.*

Black Head. See 25 Geo. 3. c. 10. s. 1.

Blacksmith. See ante, *Apprentice*, vol. ii. p. 70. *Bankrupt*, vol. iii. p. 451. post, *Farrier.*

Blank Endorsement. See tits. *Bills of exchange and Promissory Notes; Deeds.*

Blanks. See tit. *Demurrer.*

Blasphemy.*

1. *REX v. CARLISLE.* M. T. 1819. K. B. 3 B. & A. 161.

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The 9 & 10 W. 3. for the more effectual suppressing of blasphemy, does not take away the common law punishment for that offence, and the prosecutor may proceed either at common law or by statute.

A motion was now made in arrest of judgment upon a party who had been convicted upon an information filed against him by the Attorney General, for a blasphemous libel. It was contended, that although this was an offence at common law, yet that since the statute 9 & 10 W. 3. c. 32. which provides, that persons committing the offences there specified, who shall be convicted thereof by the oath of two witnesses, shall be subject to certain disabilities, and punished in a particular manner, over which the judges have no discretion; the defendant could no longer be proceeded against as formerly; and it was urged that it might be laid down, where a statute prescribes a particular mode of proceeding, and affixes a particular punishment to the offence, then unless there be an express saving of the common law, the only mode of proceeding is upon the statute. *Sed per Cur.* It has long been a settled maxim, that neither the provisions of the common or statute laws are abrogated but by the express words of an act of parliament, or by subsequent enactments so inconsistent with the previous law, as to raise the necessary implication that the legislature intended it should be altered. The judgment of Lord Mansfield in *Rex v. Robinson*, Burr. 749. may be here appositely quoted, in which he said, that where a statute creates a new offence by prohibiting and making unlawful any thing which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because there the sanction is cumulative, and does not exclude the common law punishment. But to come more closely to the period before us; so far from the statute of William containing provisions so inconsistent with the common law, as to operate as a repeal by implication, as far as it applies to the offence of libel, it seems intended to aid the common law. It is called, "An Act for the more effectual Suppression of Blasphemy and Pro-

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* The term Blasphemy does not seem, to define any particular species of offence. Heresies, even, of which the common law had no cognizance, were so styled; its proper meaning when used at common law appears to be an injury offered to the Deity, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature; *Lindw. c. 1.* And blasphemies of God as denying his being, or providence; and all contumelious reproaches of Jesus Christ, &c., are offences of the common law, punished by fine, imprisonment, pillory, &c. 1 Hawk. P. C. p. 10. s. 1. And by statute 9 & 10 W. 3. c. 32. if any one shall by writing, speaking, &c. deny any of the persons in the Trinity to be God, or assert there are more Gods than one, &c. he shall be incapable of any office; and for the second offence, be disabled to sue any action, to be executor, &c. and suffer three years imprisonment. Likewise by stat. 3 Jac. 1. c. 21. persons jestingly or profanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, in any stage play, &c. incur a penalty of 10l.

faneness." It would ill deserve that name if it abrogated the common law, inasmuch as, for the first offence, it only operates against those who are in possession of offices, or in expectation of them. Both the common law and this statute are necessary; the first to guard the morals of the people; the second, for the immediate protection of the government. Rule refused.

2. *REX V. WADDINGTON*. M. T. 1822 K. B. 1 B. & C. 25.

It was moved that the defendant might be brought up for judgment, as he had been convicted on the trial of an *ex officio* information of a blasphemous libel, in which, among other things, it was said, "that Jesus Christ was an impostor, and a murderer in principle." The defendant then moved for a new trial, on the ground that the Lord Chief Justice had told the jury that it was a libel to deny the divinity of Jesus Christ. He contended that the Lord Chief Justice, by so doing, had misdirected the jury, because the Toleration Act, 55 Geo. 3. c. 160. permits any person to speak against the Trinity without committing any offence. *Per Cur.* The direction of the Lord Chief Justice was correct. To publish of our Saviour that he was an impostor, and a murderer in principle, is, without doubt, a libel at common law. This publication does not merely deny the Godhead of Jesus Christ, but speaks of him in terms which no laws can allow, no society permit. The christian religion is part of the law of the land; and therefore, although it is no offence to question the authenticity of the Scripture in calm and temperate reasoning, yet it is a very high offence to abuse and revile it. It has been contended that since the statute 55 Geo. 3. c. 160. it is no offence to deny the doctrine of the Holy Trinity, and that every person is at liberty to speak and write of the persons forming the Godhead in any manner he pleases. Such is not the law, for the statute 55 Geo. 3. has been little understood. By the statute William and Mary, sess. 1. c. 18. dissenters are permitted to worship God in the manner most agreeable to their own opinions of the Christian Religion, and by it they are exempted from several punishments to be inflicted on those who do not conform themselves to the performances of its rites. Then followed the 9 & 10 Will. 3. c. 32. to give security to the government, by excluding from office all persons who entertained opinions dangerous to the religion as established in this country. And lastly came the stat. 55 Geo. 3. wisely extending the benefits of toleration, and taking away the penalties and disabilities imposed by the former acts. But it did not alter the common law, which on this subject cannot be changed as long as the christian religion is part of the law of the land. By the common law, the publication of the defendant is a libel, and there is no ground for a new trial. Rule refused.

Hence a publication stating Jesus Christ to be an impostor and a murderer in principle, has been held to be blasphemous at common law.

Flock of Stone. See *post*, tit. *Nuisance*.

Blood and Descents. See tit. *Descents*.

Board of Controul. See tits. *East India Company*; *Mandamus*.

Board of Green Cloth. See *ante*, vol ii. Arrest, 303.

Boat. See tit. *Trover*.

Bodleian Library.

MICHELL V. RABBETTS. Cited in *SWINNERTON V. MARQUIS OF STAFFORD*. T. T. 1810. C. P. 3 Taunt. 91.

The Court of Exchequer determined that a manuscript in the Bodleian library at Oxford, entitled "*Secretum Abatis*," was inadmissible as evidence of a grant to an abbey, because the document was a register kept by the monastery for the entry of their own rights.

Body Corporate. See tit. *Corporation*.

Bought and Sold Note. See tits. *Principal and Agent*; *Vendor and Purchaser*.

Body, Rule to bring in the.

1. *HUTCHINS V. HIRD*. H. T. 1794. K. R. 5 T. R. 479. S. P. PARKER V. WALL. M. T. 1785. K. R. Cited Impey's sheriff, 88.

On a process returnable on the 19th of November, a rule to return the writ

* Upon the sheriff's return of *cepi corpus et paratum habeo*, if bail above be not duly on out until put in, or, if put in and excepted to, they do not justify in due time, the plaintiff may pro-

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A grant to an abbey contained in a MS. in the Bodleian library at Oxford, cannot be supported if the document is a register kept by the monastery as an entry of their own rights.

The rule to bring in the body* can not be taken out until the day of

ter the expiration of the rule to return the writ.

expiring on the 23d, was served on the sheriff. On the 23d, the sheriff returned *cepi corpus*; and in the evening of the same day, he was ruled to bring in the body. Subsequently, on motion for an attachment, it was insisted that the plaintiff ought not to have ruled the sheriff to bring in the body until the 24th, the day after the expiration of the rule to return the writ; and of that opinion were the Court, who also observed that the sheriff had the whole of the 23d to return the writ.

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And the time for putting in bail has elapsed.

2. *ROLFE V. STEELE*. H. T. 1794. C. P. 2 H. Pl. 276. S. P. *REX V. THE SHERIFF OF MIDDLESEX*. T. T. 1807. K. B. 8 East. 525.

A *capias* was returnable on the 3d of November. On the 6th the sheriff was ruled to return the writ. On the 12th he returned *cepi corpus*; on the 13th he was ruled to bring in the body, and on the 21st an attachment issued. On motion to set aside the attachment as irregular, because the rule to bring in the body had issued a day before the time was out for the defendant to put in bail, for the writ being returnable the first return of the term, and it being a country cause, the defendant had eight days after the first day of full term; the Court were of opinion that the attachment was irregular, the rule to bring in the body having issued too soon.

In the Exchequer, however, such a rule may be taken out on the same day the writ is returnable, if the time for putting in bail has expired.

3. *GORE V. WILLIAMS*. H. T. 1793. 3 Anstr. 653.

A writ of *quo minus* was returnable on the 3d of November; the plaintiff on the 9th served the sheriff with a rule to return the writ; it was returned according to the exigency of the rule on the 13th. Afterwards, on the same day, a rule to bring in the body was served on the sheriff. On the 16th notices of bail and their justification were given for the 18th, and on that day the bail came up to justify, and granted an attachment.

4. *BUCKLER V. BLYTH*. M. T. 1794. 3 Anst. 779.

And where the writ expired two days after the end of the term, a rule to bring in the body, taken out next day, but dated on the last day of term, was holden regular.

A *quo minus* was returnable on the 11th June. On that day the plaintiff obtained a rule to return the writ, but did not serve it till the 13th, so that it did not expire till the 17th. The 15th June was the last day of term. On the 18th the plaintiff took out a rule to bring in the body, dated as of the last day of term; the regularity of this rule was disputed on a rule to show cause why the rule to bring in the body should not be set aside. On showing cause, it was insisted that this was within the general practice of all the courts, to permit side bar rules to be taken out in vacation, tested for form sake, of the preceding term. And the Court, after consulting with the officers, held the preceding regular, and discharged the rule.

5. *THE KING V. THE SHERIFF OF LONDON*. H. T. 2 East. 241.

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The rule must not be tested before the return of *cepi corpus*, and the fact of its being issued subsequent to that return will not aid the irregularity.

A special *capias* issued on the 24th November, 1801; to which bail was given, returnable on the 25th; on the 26th the sheriff was ruled to return the writ. On the 2d December bail was put in and excepted to; on the 9th notice of justification was given for the first day of H. T. On the 7th January 1802, a rule to bring in the body was served, tested on 27th November preceding, being the day the return of *cepi corpus* had been made, on the 25th of January an attachment was granted against the sheriff. On a motion being made to set aside the attachment, it was contended that the rule to bring in the body was irregular, being tested not only before the day given for the return of the writ, but because it bore teste on the 27th November, the day on which the return of *cepi* was in fact made. *Per Cur.* The rule to bring in the body is clearly irregular. It is an incongruity on the face of the proceeding, that that rule which, from its nature, ought not to be made till after the return of *cepi corpus*, should appear upon the face of it to have been made before such return. The rule for setting the attachment aside must be made absolute.

ceed against the sheriff by ruling him to bring in the body. This is a four day rule in London or Middlesex, and six day rule in any other city or county; see Tidd. 333. The rule when served on the Sheriffs of London, Middlesex, or Surrey, may be served at the usual office; but with respect to the sheriffs of other counties, &c. the rule must be served on the respective under sheriffs: see Doug. 420. The rule must not be served on the agent of the under sheriff of London, Middlesex or Surrey, but at the public office only, because these offices are, in fact, considered as the offices of the under sheriffs themselves; *ibid.*

6. **THE KING v. THE SHERIFF OF MIDDLESEX.** M. T. 1815. 4 M. & S. 427. A *capias* had been issued returnable on the first return M. T.; on the 7th November the Sheriff was ruled to return the writ; on the 11th, he returned *cepi corpus*. The time for putting in bail expired on the 10th; on the 11th he was ruled to bring in the body. On a motion to set aside an attachment obtained against the sheriff, it was submitted that as the time to put in bail had expired when the rule to bring in the body was served, the practice was regular. The Court concurred in this view of the case, and said that in all cases where the time for putting in bail has expired, the plaintiff may rule the sheriff to bring in the body on the same day as he returns *cepi corpus*.

7. **ANON. T. T. 1771. K. B. Lofft. 631.**

When the sheriff is ruled to bring in the body he has four days exclusive of the day when the rule issued, and was served upon the sheriff.

8. **NORTH v. EVANS.** E. T. 1792. C. P. 2 H. Bl 35.

In this case the Court held that the rule to bring in the body was one day exclusive, and the other inclusive, therefore an attachment cannot be moved for until the morning of the fifth day. And if the rule be served on the *Wednesday*, an attachment cannot be moved for until the Tuesday morning following, Monday being considered as a *dies non*.

9. **WOLFE v. COLLINGWOOD.** H. T. 1749. K. B. 1 Wils. 262.

Upon motion to discharge a rule to bring in the body, on the ground that the sheriff had taken a bail bond, which he was obliged to do by stat. of Hen. 6. and had permitted defendant to go at large, and could not by law take his body again and bring it into court, the Court held that the sheriff must either bring in the body, or justify good bail in court, for the plaintiff was not concluded by the act of the sheriff, and refused to discharge the rule.

10. **MACLEOD v. MARSDEN.** T. T. 1739. C. P. Barnes. 32.

In this case the question was, whether a rule to bring in defendant's body after *cepi corpus* returned by the sheriff ought to be discharged or not; it being suggested on behalf of the sheriff that defendant was in custody, and had remained there since the arrest; but it appearing that he had been suffered to escape, the Court said, had the sheriff shown defendant to be in actual custody the rule ought to be discharged; but as there appears an escape, the rule must be obeyed.

11. **REX v. THE SHERIFF OF MIDDLESEX.** E. T. 1819. K. B. 2 B. & A. 623; S. C. 1 Chit. Rep. 393.

On a return by the sheriff of *cepi corpus*, it appeared that the plaintiff brought an action against him for an escape, and recovered damages to the same amount as the party who was in his custody had been arrested for, and that afterwards a rule had been obtained against the sheriff to bring in the body; to discharge which a rule *nisi* had been obtained, which the Court now made absolute, observing, when the sheriff made his return, the plaintiff had his choice of two modes of proceeding. He might have ruled the sheriff to bring in the body, or he might have brought an action against the sheriff on the ground that the return was false. He has selected the latter course, and having done so and recovered damages, can he now sue the sheriff again for the same cause of complaint? We think he cannot. *Sed vide Com. Dig. tit. Escape.*

12. **REG. GEN. T. T. 1793. K. P.**

Whereas, by the present practice of this court, the bail put in for the defendant, in any action, cannot render such defendant, after a rule has been granted against the sheriff to bring in the body, before such bail have justified themselves in open court, it is ordered, that from and after the last day of this term, bail shall and may be at liberty to render the defendant, notwithstanding such The sheriff is not bound to bring the defendant actually into Court; if he show that he is in custody it will suffice; see Barnes, 32.

* The sheriff, when ruled to bring in the body, may put in bail for the defendant, without his consent, and justify the same, to prevent an attachment, and the bail may afterwards render the defendant; *Rex v. Butcher, Peake, N. P. 168. abridged ante, vol. iii. p. 116.*

But it may be served on the day the sheriff returns *cepi corpus* provided the time for putting in bail has expired.

The sheriff has four days exclusive of that on which the rule was served. The days are calculated, one exclusive and the other inclusive.

[582] It is no answer to such a rule for the sheriff to say he has taken a bail-bond.*

To prevent the issuing of such a rule, the sheriff should return that the body is in actual custody.

Where the plaintiff has brought his action against the sheriff for an escape, and recovered damages, the Court refused to compel the latter to bring in the body to enable the plaintiff to proceed against the sheriff for the false return.

And bail may render the principal pending rule-to

bring in the rule, at any time before the expiration thereof, the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof.

13. *RIX V. THE SHERIFF OF MIDDLESEX*. H. T. 1798. K. B. 7 T. R. 527.
In consequence of the preceding rule, a motion was made, on the construction of it, whether the sheriff could put in bail, in order to comply with the rule, to bring in the body without justifying. The Court. The sheriff was [583] not obliged to justify his bail; and the above rule extends to the case of sheriffs.

14. *THOROLD V. FISHER*. E. T. 1788. C. P. 1 H. Bl. 9.

In this case the rule to bring in the body expired on the 19th; on the 21st the defendant's bail justified. On the same day an attachment was obtained for not bringing in the body. On motion to set it aside, the Court consulted the prothonotary, who stated the practice to be, that though the rule for bringing in the body had expired, yet if the defendant justifies his bail before the plaintiff moves for an attachment, the sheriff is not liable to the attachment. Rule absolute.

And the sheriff, though after the rule to bring in the body had expired, it is sufficient to prevent it;

15. *WEDDALL V. BERGER*. M. T. 1798. C. P. 1 B. & P. 325.
On pay- The justification of bail was opposed, on the ground of the sheriff's being ment of the costs of the in contempt, the rule to bring in the body having expired the day before. But opposition. on the defendant paying the costs of the opposition it was allowed.

16. *TURNER V. BRISTOW*. M. T. 1799. C. P. 2 B. & P. 38.

After the rule to bring in the body had expired, the bail were brought up to justify on the same day on which an attachment had been obtained against the sheriff. On motion the Court permitted the bail to justify, and set aside the attachment with costs, not recognizing the priority of motion.

17. *JARRET V. CREASY*. H. T. 1804. C. P. 3 B. & P. 603. S. P. 1 Taunt. 56.
Instructions were given for an attachment of the defendant in this case, in consequence of bail not being put in within the allotted time; and, on his appearing on the day following its expiration, he was opposed, on the ground that the defendant ought to pay the costs of the motion. The Court held, that though the motion gained no advantage from priority, yet, as the plaintiff moved in ignorance of the defendant's intention of following up his notice of justification, he ought to be paid the costs. Justification was therefore allowed on payment of costs.

18. *REX V. THE SHERIFF OF MIDDLESEX*. E. T. 1814. K. B. 2 M. & S. 562.
An attachment, it appeared in this case, had been moved for against the sheriff for not bringing in the body of A. B. It was also proved, that a surrender had taken place, although subsequent to the time of the expiration of the rule to bring in the body. It was therefore moved to set it aside for irregularity. The Court made the rule absolute, without costs, observing, that as in the body the rule for bringing in the body had expired when the attachment was obtained, it might make a difference as to the costs.

19. *REX V. THE SHERIFF OF MIDDLESEX*. H. T. 1789. K. B. 3 T. R. 133.
S. P. *REX V. SHERIFF OF ESSEX*. H. T. 1795. K. B. Cited *Impey's Sheriff*, 87.

On an attachment against the sheriff for not bringing in the body, the Court held, that if the sheriff be once in contempt for not bringing in the body, that contempt was not purged by the defendant's surrendering on a subsequent day, though before an attachment was moved for against the Sheriff.

20. *REX V. THE SHERIFF OF MIDDLESEX*. H. T. 1789. K. B. 3 T. R. 133.
On motion for an attachment against the Sheriff of M. for not bringing in the body, the Court were of opinion that it must be made on the crown side of the Court and that, on motion to set it aside, the affidavits are to be entitled the King v. the Sheriff of —.

21. *REX V. SMITHIES*. T. T. 1789. K. B. 3 T. R. 351.

On motion for an attachment, the Court were of opinion that the motion must be grounded on an affidavit stating that the rule was served personally on

the under sheriff, and that the original rule was shown to him at the time.

22. REG. GEN. T. T. 1798. 1 B. & P. 312. S. P. Memorandum. T. T. 1768. K. B. 1 Burr, 651.

It is ordered, that where a rule to bring in the body shall expire on the last day of term, the plaintiff shall also be at liberty, at the rising of the Court on that day, to move for an attachment for not bringing into Court the body of the defendant, and that such attachment may be accordingly issued on the following day; provided bail shall not then be perfected, or the defendant rendered in discharge thereof.

23. RITCHIE v. GILBERT. E. T. 1792. Cited Impey's Sheriff. 88.

In this case the Court held, that if one of the bail put in be an attorney, the plaintiff may go on and treat such a bail as no bail, and on that account an attachment for not bringing in the body was refused to be set aside.

24. ROLFE v. STEELE. H. T. 1794. C. P. H. Bl. 276. S. P. COHN v. DAVIES 1 H. Fl. 80. abridged ante, vol. iii. p. 153.

On motion to set aside an attachment, the Court said—Although an attachment is irregular, where the rule to bring in the body issues before the time of perfecting bail, the sheriff cannot move the next term to set it aside for irregularity, but he must take advantage of it as soon as possible.

25. MAYCOCK v. SOLYMAN. M. T. 1804. C. P. 1 N. R. 139.

A rule to set aside an attachment was opposed, on the ground that a sheriff could not make such a motion till after justification of bail.

Sed per Cur. Where a plaintiff has obtained an attachment before the time prescribed by law, the sheriff may move to annul it.—Rule absolute, with costs.

26. PRESTON v. TRACY. H. T. 1746. C. P. Barnes. 98. S. P. HENLEY v. ANDERSON. M. T. 1758. C. P. Barnes. 80.

The defendant was arrested last term, but no bail-bond was taken; the sheriff being called on, returned a *cepi corpus*; and being served with a peremptory rule to bring in the body, bail was perfected in court, and the rule discharged. As the time for bringing in the body had expired the sheriff was ordered to pay the costs of a motion for an attachment against him.

27. REX v. THE SHERIFF OF SURREY. M. T. 1797. K. B. 7 T. R. 452.

A *latituit* was sued out on the 29th of November, 1796, directed to the late sheriff of Surrey, returnable on the 23d of January, 1797, on which the defendant was arrested, and a bail-bond given. The 24th of January, he was served with a rule to return the writ; he returned *cepi corpus*. After that time, no proceedings were had until Mich. 1797, when the above sheriff was ruled to bring in the body, and a rule for an attachment granted, which was issued. Motion in this term to set it aside, the affidavit stating both the bail were become insolvent, and defendant absconded. The Court said, that though there was no decided case on this subject, it was highly unreasonable that the sheriff should be called upon at this distance of time, when the bail and defendant had both become insolvent; and made the rule absolute.

28. MEEKINS v. SMITH. E. T. 1791. C. P. 1 H. Bl. 636.

It was holden in this case, that although the sheriff go out of office after he had been served with a rule to bring in the body, and a new sheriff appointed, if he does not justify bail in due time, he is liable to an attachment.

29. REG. GEN. T. T. 1791. K. B. 4 T. R. 379

It is ordered, that where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall afterwards be returned, he shall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

Word. See also tits. Accord and satisfaction. ante, vol. i. p. 126.

* Who may be called upon for that purpose at any time within six months after the expiration of his office; but he is not liable on request only; he must be served with a rule for that purpose; see 2 T. R. 1. The months are lunar months, and the day of the sheriff quitting his office is reckoned as one, see Doug. 468.

And may be made on the last day of term. If the sheriff takes an attorney as bail, he may be attached for not bringing in the body without exception. Any irregularity in the attachment must be taken advantage of as soon as possible. [585] Hence it may be done before the bail have justified. If not, the sheriff must pay the costs of a motion for the attachment. But if the plaintiff delay his proceedings against the sheriff, and the bail be become insolvent in the meantime, the Court will discharge the attachment issued for not bringing in the body. And the same rules apply to the late sheriff. Although he is out of office before such rule be granted.

[586] African Company, *ante*, vol. i. p. 442. Annuity. Arbitration. Auction. Bail. Bankrupt. Bastard. Bottomry and Respondentia Bond. Chose in Action. Composition with Creditors. Contract. Contribution. Covenant. Debtor and Creditor. Deed. *Donatio Mortis Causa*. Duress. Ecclesiastical Persons. Embezzlement. Excommunication. Executor and Administrator. Extinguishment. Forgery. Gaming. Gift. Guarantee. Impressment. Inclosure. Infant. Inquiry, Writ of. Inns of Court. Insurance. Interest. Limitations, Statute of. Marriage. Marriage Settlement. Money paid. Partners. Payment. Penalty. Pleading. Popish recusant. Post Obit Bonds. Principal and Agent. Recognizance. Release. Replevin. *Scire facias*. Set-off. Ship. Statute Staple. Statute Merchant. Stock. Underwriter. Usury. Venue. Warrant of Attorney.

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I. RELATIVE TO THE NATURE, LANGUAGE, FORM, AND EXECUTION OF A BOND.

(A) AS TO ITS GENERAL NATURE AND FORCE.

A bond or obligation is a deed, whereby a person obliges himself, his heirs, executors, and administrators, to pay to another person a certain sum of money on an appointed day. The party binding himself is called the obligor, and the obligee is the person to whom the money is to be paid; but bonds generally contain a condition, that, on payment of the sum mentioned therein, or in event of the obligor performing a certain act on the day mentioned, the bond shall be void; and the obligor, in such bond, subject himself to a penalty in case the condition is not duly performed; Perk. Fait, 119; Co. Lit. 172. a; fac. Abr. Obligation; Cruise. Dig. IV. 99; Yelv 194. This instrument is distinguishable from an indenture, which is *inter partes*, by its being obligatory only on the obligor, and requiring only one seal, expressive of the assent of the party intended to be bound by it; it is therefore polled or shaven smooth at the edges; Lit. 370. 371-2; Co. Lit. 55. 229. a. (in n.); Plowd. 134. 421. These instruments being merely acknowledgments of a debt, it is not necessary that they should be expressed to be deeds, but may be in any form, if the language will admit a construction, that the party making it intended to acknowledge his liability; Bro. Abr. 67; Co. Lit. 137. 139. Therefore, a letter of attorney (3 Mod. 153; S. C. Comb. 87), and an acknowledgment written on a page of a book, whereto a seal was affixed Cro. Eliz. 613.) have been respectively holden to constitute good bonds.

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(B) AS TO ITS BEING ON PAPER OR PARCHMENT.

It is essential to the nature of a bond, in common with other deeds, that it be written or printed on paper or parchment; and it will not be a valid instrument if the materials used consist of wood, stone, leather, or cloth. The reason assigned for this practice is the superior durability of paper or parchment contrasted with the more perishable nature of other materials; Co. Lit. 35. b. 229. a; Com. Dig. Fait. A. 1; 2 Roll. Abr. 31. l. 40; Bro. Abr. Obligation, 30. 67; F. N. B. 122.

(C) AS TO ITS BEING IN THE ENGLISH LANGUAGE.

Formerly a bond might be expressed in any language; 2 Rep. 3; Cro. Jac. 208; but since the passing of the statute 4 Geo. 2. c. 28. s. 1. it would seem to be essential that they should be made in the English tongue, though, perhaps, from the context of that act, it might be argued, that the bonds there alluded to were only such as might be given in the course of legal proceedings.

(D) AS TO THE MODE OF EXPRESSION.*

1. THROGMORTON v. PLIMOUTH. E. T. 1688. K. B. Comb. 87; S. C. 3 Mod. 154.

The words of a bond were, "I do direct and appoint A. B. to take and receive to his own use 100*l.* of lawful money of England, out of the first money which he shall receive of mine." The defendant's counsel insisted, that the above terms were insufficient to support an action of debt; but the Court held it a good obligation.

2. WATSON v. SNAED. H. T. 1672-3. K. B. 1 Vent. 238.

A bond appeared, on oyer, to be couched in the following terms; "I do acknowledge to A. B., by me, 20*l.* upon demand, for doing the work in my garden." The defendant demurred, but the Court adjudged it to be a good bond. See Dy. 22. b.

It is immaterial what mode of expression is used, if the language is sufficient to establish an acknowledgment of a debt.

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Therefore, the terms of a writing under seal, which are, "I do acknowledge to A. B. by me 20*l.* upon demand, for doing the work in my garden;"

* As a bond is in the eye of the law only an acknowledgment of a debt, it is not necessary that any technical words should be used in such an instrument, if it can be collected from the circumstances and tenor of the language; that the obligor intended to hold himself bound to the obligee; 2 Roll. Abr. 146. E. 87. The result of the cases may be considered under the following divisions. 1st, As to what amounts to a sufficient acknowledgment. A direct acknowledgment has been holden to constitute a bond, as "I acknowledge to owe" A. B., for which payment I bind, &c.; Cro. Eliz. 886. And every deed that expressly recognizes a debt in the obligor, Dyer, 21. a.; as *concedo nobis solvere*, &c.; 2 Roll. Abr. 146. l. 40; or if it be in the imperfect tense, as "I have agreed" to pay, &c.; 1 Leon. 25; or when the bond was "I am content to pay," &c.; 3 Leon. 119; and even the expression "I shall pay," &c. are sufficiently explicit of the obligation. So a deed acknowledging a legal liability to pay money, as where the obligor ac-

3. SAWYER v. MAWGRIDGE. E. T. 1709. K. B. 11 Mod. 218.

On oyer, on a motion in arrest of judgment, the instrument declared on as a bond appeared to be an authority from the defendant to the plaintiff, to make sale of his goods to a specified amount, and the document concluded in the following words, "*which I do hereby acknowledge I owe you.*" The Court thought that the obligation appeared on the face of the instrument, and said, that the word "oblige" was not material, if the whole, taken together, would amount to an admission of a debt being due. See Dy. 20. a; 1 Vent. 42. 238; Reilw. 31. b; Cro. Eliz. 561. 836.

4. CROMWELL v. GRUNSDALE. E. T. 1693. K. B. 12 Mod. 194; S. C. Holt. 122. 502; S. C. 5 Mod. 281; S. C. 1 Ld. Raym. 335; S. C. 1 Salk. 462; 3 id. 73; Comb. 473.

Per Cur. Where bonds are not sufficiently explicit, or where their language, if construed literally, would be nonsense, we must endeavour to discover the intent of the obligor, and be guided thereby. See Comb. 87; S. C. 3 Mod. 153.

5. BOND v. MOYLE. M. T. 1688. C. P. 2 Vent. 106.

In debt on a bond for 28l. 2s. 4d., the declaration stated, that whereas the defendant, by a certain bill obligatory, *cognovisset se debere et indebitum fore* to the plaintiff, *summum viginti et octo librarum duorum solidorum et quatuor denariorum solvere querenti, &c. ad vel super vicesimum nonum diem Septembris qui foret anno Dom. 1685, pro vera solutione quatuordecim librarum unius solidi & quatuor denariorum ipse* (the defendant) *obligasset se firmiter per eandem billam, & in facto dicit quod* the said Moyle *non solvit querenti* the said 14l. 1s. 4d. upon the said, &c. *per quod, &c.* On demurrer, the Court held, that though it was not correctly drawn as a penal bond, there was sufficient to support an action of debt, and observed, that the day of payment appeared to refer to the first-mentioned sum. See 1 Cro. 771.

6. EARLE v. ANDREWS. E. T. 1688. K. B. Comb. 86.

On a motion for leave to amend an original, on the ground that the word *quadringinta* had been written, through mistake, for the word *quadringenta*; the Court removed the motion, observing that, had it been a bond, they would have allowed an amendment.

7. DENNIS v. SNAPE. T. T. 1687. K. B. Comb. 60.

On the plea of *non est factum*, the Court held, that a bond in *tricesimo secundo libris* was good. See 1 Cro. 416-18; 2 ibid. 284. 290.

8. CROMWELL v. GRIMSDALE. E. T. 1690. K. B. Comb. 477-8; S. C. by the name of CROMWELL v. GRUNSDALE. 2 Mod. 278. 281; S. C. 2 Salk. 462; 3 ibid. 73; S. C. 1 Ld. Raym. 335; S. C. Holt. 122. 302; S. C. 12 Mod. 193; S. C. 2 T. Jones, 53.

In debt on bond, the declaration stated, that the obligor, *primo die, &c. concessit se teneri* (to the plaintiff) *in quadraginta libros. per hæc verba, "in quadrans libros."* On *non est factum* the jury found for the plaintiff in the words knowledge that he has in his hands money belonging to another; Dy. 21. a. or a memorandum of a loan accompanied by a promise to pay the lender; 2 Rol. 146. 1 85; 22 Ed. 4. 22. a.; Dy. 22. b.; Cro. Eliz. 729; Moor. 667; Owen, 127, Yel. 23; 2dly, As to the construction to be given to the words. An improper but seeming latin word, as *triginti*, for *triginta*; Rol. 146. 1 45; *sessanta* for *sexaginta*; 2 Rol. 147. 1. 20; Hob. 19; 2 Cro 208; or if the impropriety arises from an orthographical error, as *sexiginti*, for *sexaginta*; 2 Rol. 147. 1. 10.; Hob. 20; 2 Cro. 338: will be. Though where, as in the word *septuagint*, an "e" has been inserted, the termination "gent" has been generally construed to intend an hundred; 2 Rol. 147. 1. 2; Moor. 645; 1 ibid. 146. 1. 50; Hob. 116. 119; 2 Cro. 146; Cro. Eliz. 896; 2 Rol. 147. 1. 5; 11 Rep. 133. a. So the substitution of a "w" for a "v;" 10 Rep. 133 a; 2 Rol. 147. 1. 42. So where "w" is incorrect and would have been misplaced if correct; 2 Cro. 607; W. Jones, 366; Keb. 198. 2 Cro 261; so where a word used in common parlance, is not Latin, as *nobilis* for *nobles*, the coin; 2 Rol. 146. 1 42; 2 Cro. 203; and the use of the superlative degree has been held immaterial; 2 Rol. 147. 1 27; 2 Cro. 290; Hob. 75; Moor 864. But where the words are insensible in themselves, and the context will not afford an inference of the intent, the bond is void; as *litris*, *lib'is*, or *liveris*; 2 Rol. 146. 1. 47; ibid. 147; 1 13. 80 55; Noy. 109; Hob. 19. 172; Dyer 850 a; 2 Cro. 202. 203. 608; 1 Lev. 166. So if the sum be omitted entirely; Yelv. 225.

Or which authorises A. B. to sell his goods to a certain amount, concluding, "which I do hereby acknowledge I owe you," are good. And where the language is grammatically or otherwise incorrect, the intent of the parties may be collected from the context. Hence, where a bond was not drawn in the usual form of a penal bond the Court held it good. [592] So where the penalty in a bond was expressed by an improper Latin word through an orthographical error; Or where an ingrammatical, Or a word similar to Latin, was used.

And even where the words were transposed, so as to destroy the sense of the sentence, the Court have held on them good.

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Semb. the words in a bond, "*ad solutio nem obligant se et utrumque eorum per se pro toto et in solido hæredes executores et administratores.*"

A bond was declared on as in *triginta et sex libris*, and on oyer appeared to be in *sex triginta libris*, for the payment of 18l., and the defendant demurred, on the ground of a variance. But the Court were of opinion, that, taking into consideration the similarity of the word, and the other circumstances of the form, the variance was immaterial.

(E) AS TO ITS BEING JOINT OR SEVERAL.*

1. WATTS AND WIFE V. GOODMAN. H. T. 1726. K. B. 2 Lord Raym. 1460.

Two obligors had entered into a bond, and acknowledged themselves to be bound to the obligee in the penalty *ad solutionem obligant se et utrumque eorum per se pro toto et in solido hæredes executores et administratores*. On demurrer,

* As several cases, anterior to the time allotted, to this abridgement, have been decided upon the effect of introducing the name of several obligees and obligors in the same bond, it is intended in this note to examine the subject, 1st, With reference to there being several obligees; 2d With reference to there being several obligors.

1st. *Several Obligees* It is a rule that a party cannot be bound to several persons in one obligation to pay them separately; hence a bond of 200l. to two, to pay 100l. to the one and the residue to the other, is void; Dy. 350. pl. 20; Hob. 172; 3 Brownl. 207; Yelv. 177; sed vide 1 Saund. 153 154. n. And where the following expressions were used in a bond, be it known that I. A. do acknowledge myself to owe and be indebted to B. & C. in the sum of 91l. 12s. 8d. for which payment to be made I bind myself in 100l." it was doubted by the Court whether B. alone could bring the action, or both should join; Foxall v. Sands, Cro. Jac. 251; but it is conceived that both should have been made parties, to the action, and that the words for which payment to be made "I bind myself in 100l." ought to have been rejected as surplusage; see Cro. Eliz. 886; for the former was the obligatory part of the instrument; and the general rule here applied, that in an action upon a contract, whether express or implied; by parol or under seal, or of record, the action must be brought in the name of the parties in whom the legal interest in such contract is vested; see post tit contract; Parties to actions; and therefore the legal interest and cause of action being in B. & C. jointly, all the obligees should have been included in the suit for the recovery of the 91l. 12s. 8d. It is also a clear principle, that if an obligation be made to three to pay one of them, they must all join in the action, for they are but an one obligee; Yelv. 177.

Where a bond is made to A. to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A. and the third person cannot sue or even release the demand; 2 inst. 678; 1 Lev. 266; 3 Lev. 189. But upon a single bond or deed poll, reciting that the obligor had received of A. 40l. for the use of C. and D. equally to be divided, to be repaid at such time as should be thought best for the profit of C. and D; it was decided that C. and D. might maintain separate actions for their respective moieties; Cro. Eliz. 729; see post tit. Covenant.

When one or more of several obligees die, the legal interest is vested in the survivor, and in suing upon such bond, the executor or administrator of the deceased cannot be joined, nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the obligation, and the executor must resort to a court of equity, to obtain from the survivor the testator's share of the sum recovered; 1 East. 497; Salk. 444; Ld. Raym. 340.

2d. *Several Obligors*. It is clearly settled, that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally, and that the words "ourselves and each of us by himself," create a joint and separate liability, and in which case the obligee may proceed against them all, jointly, or each separately, though their interest be joint.; 1 Saund. 153 n; 5 Burr. 1190; Poph. 161; 2 B. & A. 598. But if there be more than two parties to a joint and several bond, as where three obligors are jointly and severally bound, the plaintiff must proceed against them all jointly, or each of them separately; Per Butler, J. in Stratfield v. Haliday, 3 T. R. 782; and the latter course is the most judicious, when the sum secured by the bond is considerable; for if all the obligors be joined, and one of them die after judgment, and before execution, the remedy at law against the assets, of the deceased is determined; Com. Dig. tit. action, K. 4. Bac. Ab. tit. Obligation. A Court of equity, it seems, would restrain a creditor from suing the parties jointly or severally at the same time; 1 Ves. & B. 65.

† But if they are bound in these words, *obligamus non et quemlibet nostrum conjunctim*, it is clearly a joint obligation, for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make several; Moor, 60. pl. 407; 3 Leon. 206.

one of the obligors only being sued, it was objected, for the defendant, that the bond was a joint bond, there being no words in it to make it several; and therefore, the plaintiff had proceeded incorrectly in suing the defendant alone. For the plaintiff it was argued, that the bond was joint and several; and Dyer. 310. b. pl. 8. was cited, where an obligation was made by three, and the words were *obligamus nos et utrumque nostrum per se pro toto et in solido*, and only two were sued, and they pleaded a special *non est factum* after oyer of the condition of the bond, but there was no oyer of the bond itself, and the issue was found against the defendants, and after a motion in arrest of judgment, the plaintiff had judgment; 2 Bulst. 70; Cro. Jac. 322; and the Court, in the principal case, gave judgment for the plaintiff, because the non-joinder was pleaded in bar instead of in abatement.

2. SPENCER v. DURANT. E. T. 1688. K. B. 1 Show. 8; S. C. Comb. 115.

Debt on bond. Upon oyer it appeared to be a covenant with the plaintiff and another "*et omnibus et cuilibet eorum obligat*," in 20l. for performance. Demurrer. *Per Cur.* It appearing to be a joint interest, each must bring a separate action.

3. CABELL v. VAUGHAN. T. T. 1668. K. B. 1 Saund. 291. S. P. GILBERT v. BATH H. T. 1721. K. B. 1 Stra. 503. Vent. 76; 2 Keb. 795.

Action of debt, and oyer of the bond being obtained, it appeared that the defendant, jointly with W. L. had bound themselves by the said bond, sealed with their seals, &c. to pay. On demurrer, it was argued for the defendant that the declaration was bad, because the plaintiff had declared against the defendant only, when it appeared upon the oyer that it was a joint bond, and that another was jointly bound in the same instrument, and therefore the declaration against one could not be sustained. To this objection the plaintiff's counsel answered, that the declaration was well enough; for although two other persons are named in the bond, yet it did not appear that they put their seals to it; and if the bond be not sealed by the obligor, it is then a single obligation notwithstanding the naming of the other persons. But even if the fact had been, that the other had sealed the bond as well as the defendant, the defendant, in order to take advantage of the omission, ought not to have demurred, but ought to have pleaded in abatement that two other persons sealed the bond, and that they were in full life, and so prayed judgment of the bill, as appears by 28 H. 6. 3. pl. 11; Cro. Eliz. 355; and of this opinion was the whole Court. —Judgment for plaintiff. See S. P. Whelpdale's case, 5 Rep. 119. and Cro. Jac. 152; W. Jones. 303; All. 21; Sty. 50; Skin. 230; Carth. 61; 1 Stra. 503.

4. GAULTON v. CHALINER. 1794. Cited 1 Wms. Saund. 291. f. n. S. P.

WHELPDALE'S CASE. 5 Co. Rep. 119. STEAD v. MOON. Cro. Car. 152.

Debt against two defendants upon a joint and several bond, given by them and one J. G., to which they pleaded *non est factum*. It was proved, at the trial, that J. G. executed the bond; upon this evidence, it was objected, that

But if a bond be made to two obligees, "*et omnibus et cuilibet eorum obligat*," separate actions can not be sustained.

If one of two joint obligors only be sued, the non-joinder must be pleaded in abatement, and advantage can not be taken of the omission on demurrer;

Or under the general issue of *non est factum*.

A recovery and execution against the body of one or several obligors, producing no actual satisfaction, will not operate as a bar to an action against the other; Cro. Jac. 74; 5 Co. 86; 2 Mod. 87; 2 Show. 494; 3 East. 451; and the plaintiff proceeds separately, the executor of the deceased, as well as the survivor, continue severally liable at law; 2 Burr 1190; and, from the case of Drake v. Mitchell, 3 East. 252, abridged post. tit. Covenant, it may be inferred that if one of three obligors give a bill of exchange for part of the money secured by the obligation, on which bill judgment is recovered, such judgment would be no bar to an action on the bond against the three such bills, though stated to have been given for the payment, and in satisfaction of the debt, not being averred to have been accepted in satisfaction, nor to have produced it in fact.

If separate judgments be obtained against two several obligors, one in the K. B. and the other in the C. P. and the defendant in the former be taken in execution under a *capias ad satisfaciendum*, and the lands and goods of the defendant in the latter under and *eligit* the obligor taken in execution may obtain his discharge on application to the Court, the execution under the *eligit* being deemed a satisfaction; Hob. 2; Cro. Jac. 338; 2 Bulst. 197; Godb. 257; Rol. Rep. 8. But if after an *eligit*, the judgment upon which that process was sued out be reversed, the other obligor it is said, is not entitled to relief; 2 Bulst 100; Rol. Rep. 10.

the action was not properly brought; that it was neither upon a joint nor several bond. The plaintiff was nonsuited; but the nonsuit was afterwards set aside, without argument, on the ground that the omission should have been pleaded in abatement.

5. *SOUTH v. TANNER*. H. T. 1810. C. P. 2 Taunt. 254.

And the same rule prevails where two of three obligors are sued, or even where the omission appears upon the face of the declaration.

Declaration on a replevin bond, against two obligors, stating that the sheriff, according to the form of the statute, &c. had taken J. C., N. T., and J. S. as sureties, in which said bond the said N. T. and J. S. did acknowledge themselves bound, &c. The declaration then set forth the condition, and alleged a forfeiture. The defendant prayedoyer, and then pleaded that it was *not their deed, nor the deed of either of them*; and upon this issue; Lord Ellenborough, at the trial, thought that the bond, which was set out and proved, did not support the issue of the plaintiff, and directed a nonsuit. On a motion to set it aside, it was urged for the plaintiff, that in order to make the omission of the other obligor a ground of nonsuit, the defendant must expressly show that the third obligor sealed the bond, and was yet alive, and that could not be made to appear but by a special plea. In *Whelpdale's case*, 5 Rep. 119. it was resolved, that if two are jointly liable on a bond, although neither of them is bound singly, yet neither of them can say that the bond is not his deed.

Per Cur. The declaration is against two. It appears on the face of the record, that the bond is executed by two. It also appears, indeed, on the record by means of theoyer, that the bond is executed by three; but how does that prove that it is not the deed of the two? And if it is the deed of the two, the issue is supported. It would be very odd that proof that a bond was executed by three should disprove that it was executed by two of them.—Rule absolute to set aside nonsuit.

[596] 6. *HORNER v. MOOR*. M. T. 1750. K. B. Cited by Aston, J. in 5 Burr. 2614.

Commented upon in *SOUTH v. TANNER*, 2 Taunt. 255.

But where the non-joinder, and that the other obligor is alive, appears upon the face of the record, the objection may be taken in arrest of judgment.

Action against one of two joint obligors. Plea, *non est factum*. The jury found the bond to be the deed of both. A motion was made in arrest of judgment, because the non-joinder appeared upon the face of the declaration, and that both parties had sealed the bond, and were alive. The counsel for the plaintiff admitted the correctness of this reasoning, and the judgment was accordingly arrested.

The distinction between this and the preceding case of *South v. Tanner*, is, that in *Horner v. Moor*, it appeared, on the face of the record, that another jointly sealed the bond with the defendant, and that both were still living; for had not these facts been admitted by the plaintiff's pleadings, it is perfectly clear that the case would have fallen within the general principle that, in all cases of a joint obligation if only one party be sued, he must plead the non-joinder in abatement, and cannot take advantage of it afterwards upon any plea, or in arrest of judgment, or give it in evidence.

(F) AS TO THE DESCRIPTION OF THE OBLIGEE.

1. *LANGDON v. GOOLE*. T. T. 1680. K. B. 3 Lev. 21. S. P. *LAMBERT v. BRANTHWAITE*. H. T. 1733. K. B. 2 Stra. 945.

The *solvendum* demonstrates to whom the obligor is bound, though the obligee's name be omitted in the preceding part of the instrument.*

Debt on bond by administrator of J. G. Onoyer, the obligatory part of the instrument was set forth as follows—"Know all men, that I, P. G. do stand bound (not saying to whom) in the sum, &c. and to be paid to the said J. G. the elder's executors, for which payment to be made, I bind me, my heirs and executors (without saying to whom.*)" On demurrer it was object-

* And if A. acknowledges himself to be indebted to B. in the sum of 10l. to be paid on a specified day, and binds himself and his heirs in the same bond in 20l. but does not mention to whom he is bound, yet the obligation is valid, for it shall be intended that he is bound to B. to whom he acknowledged before the 10l. to be due; *Franklin v. Turner*. 2 Roll. Abr. 148. If A. enters into a bond to B. which he delivers to C. to the use of B. though this, immediately upon the execution and delivery to C., becomes the deed of A., yet if, after it is presented to B. he (as he may) disagrees to it *in pais*, by such refusal the obligation loses its force; *Taw's case*, Dyer, 167. n.; Roll. Abr. 148; S. C. cited 1 Salk. 301 360 266; 5 Co. 1196.

Where A. binds himself in a sum to B. *solvendum*, to C. to the use of B. a payment

ed for the defendant, that this was no obligation to J. G. as described in the declaration; for the money is J. G. the elder's executors, so that if the defendant be bound at all, he is bound to the executors of J. G.; and then the plaintiff being his executor, should have sued in his own name, and not as executor, upon an obligation made to his testator. But the whole Court held that the judgment ought to be given for the plaintiff, for an obligation cannot be made to executors in the life of the testator, because he cannot have an executor during his life time. And this obligation was sealed and delivered to the testator, and it shall not be void if by any means it can be made good.—Judgment for plaintiff.

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2. BISHOP v. MORGAN. H. T. 1709. K. B. 11 Mod. Rep. 275.

And it is

Action upon a bond; after oyer, the defendant demurred, assigning for cause that the instrument was void, it being *neverint' universi, &c. me J. S. teneri et frailer obligari Richardo, &c. solvend' eidem Richardo Bishop*. The Court held the bond good, and gave judgment for the plaintiff. good al though the surname of the obligee be omitted.

See 3 Lev. 21; 2 Stra. 945.

(G) AS TO THE PENALTY.*

1. THOMPSON v. HUNT. T. T. 1692. K. B. 3 Lev. 368.

Debt on a bond against an executor; defendant pleaded an outstanding judgment obtained against him on another obligation made by the executor, and that he had no assets *ultra*; the plaintiff replied that the latter bond was for 200*l.* but conditioned to pay only 100*l.* and that the defendant had assets to pay the plaintiff; the defendant rejoined that he had not assets *ultra* to satisfy the lesser sum, and ought not to have made the penalty in the judgment parcel of the issue. For if he had assets *ultra* the sum named in the condition, he ought to pay them to the plaintiff. But it was answered, and resolved by the whole Court, that the rejoinder was good, for the penalty was the legal debt till the bond is satisfied, under which an executor may defend himself against other actions; for although in equity and conscience the lesser sum is only due, yet as the plaintiff perhaps would not accept the lesser sum in satisfaction of the judgment without a suit in equity, the penalty must be deemed the legal debt. After forfei ture of the bond the penalty is the legal debt.†

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Note.—This case was before the statute of Anne.

2. THE BANK OF ENGLAND v. MORRICE. H. T. 1735. K. B. Ca. Temp. Hard. 219; S. C. 2 Stra. 1002; S. C. not S. P. id. 1028; 2 Parnard. K. B. 183; id. 374. S. C. but not S. P. Tri. at Nisi Prius, 131; S. C. 2 Keb. 165. pl. 139; S. C. And. 110.

to C. is a payment to B. and an action upon it must be brought by B. and not by C.; Sid 238; Vent. 34; see *post div.* Assignment of Bonds.

* The sum inserted in the bond as a penalty to secure the performance of the condition is generally double the amount of the sum intended to be secured by the instrument; and as it is considered to be a compensation for the breach of the contract, the reservation of a greater sum is allowed, and it is not usurious within the statute of Anne, because it is in the power of the borrower to avoid the payment of the money reserved as a penalty, by paying the principal at the day appointed; 5 Co. 69; Cro. Jac. 509.

† And therefore, on the forfeiture of a bond, or on its becoming single, the whole penalty was formerly recoverable at law; but the courts of equity at an early period, interposed and would not permit the obligee to take more than in conscience he was entitled to receive, viz. his principal, interest and expenses, in case the forfeiture accrued by non-payment of money borrowed, or the actual damages sustained by the non-performance of other conditions. And a similar practice having gradually obtained a footing in the courts of law, by the stat. 4 & 5 Anne, c. 16. it was enacted, that in case of a bond conditioned for the payment of money, the payment or tender of the principle sum due, with interest and costs, even though the bond be forfeited, and a suit be commenced thereon, shall be a satisfaction and discharge; see *post div.* "Staying proceedings;" and when the condition is for the performance of any covenants or agreements. in any indenture, deed or writing contained, breaches must be assigned and the real damages assessed by a jury: see *post tit* Suggestion of Breaches under 8 & 9 W. 3 c. 11 s. 8. In consequence of these beneficial enactments, the stat. 8 & 9 Wm. being compulsory upon the plaintiff, there are but few instances where the whole of the amount of the penalty can be recovered, and the practice of obtaining relief by the circuitous mode of applying to a court of equity is now rendered unnecessary.

And an executor liable on such forfeited instrument may retain assets equal to the amount of the penalty.* The defendant pleaded, as executrix, outstanding bonds, given by her testator, the days of payment of the sums mentioned in the conditions of which were past, and also pleaded other bonds, in which the days of payment had not arrived. A special verdict was found; and after argument, Lord Hardwicke delivered the judgment of the Court, in effect as follows.

Upon this special verdict two points have been made; first, whether upon the pleadings in this record, and the matter found by the verdict, the penalties of the bonds, whereof the days of payment are past, or only the sums mentioned in the conditions, ought in a court of common law to be considered as liens on the assets. Secondly, if in these respects there be any difference between these bonds, whereof the days of payment are past, and the bond the days of two payments not being come at the time of the plea. As to the first point, nothing is more certain than that, if there be a bond with a penalty, when the day appointed for payment by the condition is passed, the penalty is the debt at law, and relief can be only had in a court of equity; and therefore the defendant might have pleaded so as to have had the full penalties allowed her as charged upon the assets; but she having in her plea set forth the real sums due, and having by special averment tied herself up to them, it has been insisted on by the plaintiff's counsel, that no more ought to be allowed her to cover assets than those less sums which she has shown were payable by the conditions; but we are all of opinion, that is, my brothers Page, Probyn, and myself, that the penalties of bonds whereof the days of payment are past, ought to be considered as the debts due at law, so as to cover assets.

As to the second point, we are of opinion that the defendant can be allowed no more than is due in equity and conscience, upon the bonds, according to which the days of payment are to come. The question is whether if a bond be pleaded with a penalty conditioned to pay a less sum at a day to come after the plea, whether it shall be allowed to cover assets to the amount of the penalty. It must be allowed that such a bond is pleadable, so is Cro. Car. 363. and 1 Rol. Ab. 925. pl. 2; but then it will cover assets no further than the amount of the sum payable in conscience; for the bond not being payable, nothing is due at the time of the plea, and it would be absurd to let the executor cover assets for a debt which cannot be recovered against him; and this is proved by way of pleading in such cases; so in Cro. Eliz. 315. the defendant avers that he has no assets *ultra* the money due by the condition, and not *ultra* the penalty; so in Leman and Fooke, 3 Lev. 57; judgment given for the defendant. because plaintiff in his replication did not say that the defendant had assets *ultra* what would pay the money in the condition, which directly admits, that if the replication had averred assets in the defendant's hand *ultra* to pay the less sum, it would have been good; if we consider, too, how this differs from a forfeited bond in the reason of the thing, this bond the executor may pay, by paying the less sum when the day comes, for she has admitted assets in this case by pleading it, so is 1 Salk. 198. and 312. and if she has assets, it is her duty to pay it; and if she does not, but lets the interest run upon it, having assets, that will be a *devastavit*; so is 1 Vent. 198; 2 Lev. 39. It differs also from a forfeited bond in this, that the plaintiff could not reply *per fraudem*, for it nas wot fraud in her not to pay a bond which was not due.

PALFRY V. PLEES. M. T. 1663. Sid. 270; S. C. 1 Keb. 776.

This was an action upon an agreement to enter into certain covenants, and to execute a bond for the performance of covenants; it was alleged, as a breach of the contract, that he did not enter into bond, &c. and a verdict for the plaintiff. On a motion in arrest of judgment, it was submitted that the latter part of the agreement was uncertain and void, because it was not expressed in what sum of money, what sum the bond should be executed.

* But it is more correct, in pleading, to state the sum really due; and if the bond be not forfeited, such sum only can be pleaded; 5 T. R. 309; post, tit. Executor and administrator. And if the penalty be pleaded, the plaintiff may reply the sum really due for principal and interest, which he may aver the obligee is ready to receive, and that the bond shall be repaid on foot by fraud.

Sed Per Windham, J. The sum on the bond must be the value of the agreed-upon regulated by the value of the thing secured.

Et per Cur. You shall have entered into the bond, though the sum was never so small, and why did not you tender such a one? See 5 Co. 77. b. 78. n.

4. ANON. T. T. 1774. K. B. Loft. 555.

This was a motion in an action upon a bond to stay proceedings upon payment of debt and costs. The action was brought by the trustees of a charity instituted for the purpose of advancing money to put out apprentices to small trades; 1*l. per cent.* to be paid for the loan for the first year, and 2*l. per cent.* the following.

Per Lord Mansfield. Though in common instances the debt is the substance and real demand, and the penalty only the security and shadow, yet here this being a regulation to secure the fund to a public charity, lending money on very kind and beneficial terms, for the encouragement of industry and advancement of young persons in trade, and by the smallness of the interest, and possibility of losses, the fund being likely in its nature to fail, where it not for the incidental aid of the penalties, the penalties themselves are substance, and not form. And a forfeiture of the bond subjected to the penalties, and not to payment of the mere sum only, because there are special conditions, by which they received a special benefit. [600]

(H) AS TO THE INSERTION OF THE WORDS HEIRS, EXECUTORS, AND ADMINISTRATORS.

I. BARBER v. FOX. M. T. 1669. 2 Saund. 136. S. P. HUNT v. SWAIN. E. T. 1664. K. B. 1 Lev. 165; S. C. 1 Sid. 248.

Declaration in *assumpsit* stating that the father of the defendant became bound to the plaintiff by bond, with a penalty conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defendant, in consideration of forbearance, promised to pay the plaintiff the debt, after *non assumpsit* pleaded, and verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that there was not a consideration; for it did not appear that the defendant's ancestor had bound himself and his heirs; and if the heir was not bound expressly by name, he was not bound at all.—Judgment arrested.—See Dyke v. Sweeting Wiles, 585.

BARKER AND OTHERS v. PARKER. T. T. 1786. K. B. 1 T. R. 287.

In an action by the executor of the obligee of a bond, the declaration after craving oyer of the condition, which (reciting that C. P. the testator had taken and employed J. H. as a servant in the nature of a clerk to him the said E. P. and likewise as his book-keeper and accountant, and in such other business as the said E. P. should think fit to employ him about) stipulated, that if the said J. H. should and did, from time to time, make and deliver true accounts to the

* And, therefore, in *Crossenny v. Honor*, in Chancery, 1 Vern. 180. where a bill was brought by the obligee on a bond against the heir of an obligor, alleging that he, having assets by descent, ought to satisfy the bond, the defendant demurred; because the plaintiff had not expressly alleged that the heir was bound in the bond, and the demurrer was allowed; see also 1 Ves. 212. But, if an ancestor bind himself and his heirs, it will be a lien on his heirs, who, in default of personal assets, will be bound to discharge the obligation, provided he has sufficient real assets of the obligor by descent. A bond is collateral, not a direct charge on the land; and, properly speaking, it is not an incumbrance on the realty, for it does not follow the land like a recognizance and a judgment; and even if the heir at law alien the land, the obligee in the bond by which the heir is bound, can have his remedy only against the person of the heir to the amount of the value of the land; stat. 3 W. & M. c. 14. s. 5; for he cannot follow it when in the possession of a bona fide purchaser; Bul. N. P. 175.

† But in general an executor or administrator is entitled to the full benefit of an obligation made to the deceased, though not named; and it was admitted, in *Barker v. Parker*, *supra*, that they might have sued the defendant if the default had been prior to the death; and it is a well established rule, that executors so completely represent the person of the testator, that if a man enter into a bond, his executors are bound, though they are not mentioned in any part of the instrument; 1 Inst. 292; 2 Rol. 149. l. 50; Dy. 28. a; Shep. Touchst. 369; and the same rule obtains as to an administrator; 2 Rol. 149. l. 55.

[601] said E. P. his executors or administrators, and likewise pay and deliver to the said E. P. his executors or administrators, all such sum or sums of money, bills, &c. as should come to the hands of the said J. H. of or belonging to the said E. P. his executors, administrators, &c. then the bond should be void. To this declaration the defendant pleaded performance generally. and the plaintiff replied that E. P. made his will and devised to the plaintiff, their heirs, &c. divers real estates, and also the residue of his personal estate, in trust, amongst other things, that they should carry on certain trades and businesses, in which the said E. P. was then concerned, or such other trades and businesses as might appear to them advantageous to the family of C. P., and upon such other trusts as in the said will was mentioned; that C. P. died, and that the plaintiffs duly proved the will, and took upon themselves the execution thereof, and in pursuance of the said will, continually carried on the trades and business therein mentioned; that J. H. at the time of the making the said writing obligatory and continually, from thence until and at the death of the said E. P. was employed by the said E. P. as a servant, in the nature of a clerk, and as their book-keeper and accountant in the said trades and businesses so carried on by them in pursuance of the said will, and was not from the time of the making the said writing obligatory until such a day ever dismissed from the said service, and employment; and then assigned for breach that J. H. after the death of E. P. whilst he was in the service and employment of the plaintiff as aforesaid, neglected to account &c. To which the defendant rejoined, that after the death of E. P. the said J. H. accounted with the plaintiffs of and concerning all and every sum of money, &c. which had come to his hands belonging to E. P. to his said executors, and upon such account the said J. H. was found to be in arrear to the plaintiffs as executors, in a certain sum of money, which he the said J. H. then and there paid and discharged to the plaintiffs, and that after the death of E. P. and after the plaintiffs had taken upon themselves the execution of the said will, a new agreement was made between the plaintiffs and J. H. (stating it, which appeared to be different from the former in several particulars) in pursuance of which new agreement. J. H. was employed by the plaintiffs, and that the money not accounted for was money which accrued to the plaintiffs after the death of the said E. P. And after the said accounting of the said J. H. with the plaintiffs as executors, as aforesaid, and after and in pursuance of the employment of the said J. H. under the said agreement. To this rejoinder there was a general demurrer, and after argument the Court gave judgment for the defendant; because the service in contemplation of the parties to the bond, was the service to the testator. The bond was given that the clerk should be faithful to him, and should pay all the money received on his account to him or to his executors; for money might be in his hands at the time of the testator's death, for which he could only account to the executors. And the Court relied on the case of *Arlington v. Merricke*, 2 Saund. 411. as an express authority.

(1) AS TO THE DATE.

The date is not an essential part of the bond, the day of delivery being the time of its first becoming operative; see *Cro. Eliz.* 773; 2 *Lev.* 348; 1 *Salk.* 141; 1 *Brownl.* 104; 1 *Lev.* 196; 5 *Mod.* 282; 3 *Keb.* 332; 2 *Co.* 4; 6 *Mod.* 244; 2 *Lord Raym.* 1076; and it may be shown, without prejudice to the instrument, that it was executed at a different time from that which it purports to bear date; see 4 *East.* 477; and even when delivered before the date it runs from the delivery.

(J) AS TO THE SIGNING.

CROMWELL V. GRUNDEN. E. T. 1798. K. B. 2 *Salk.* 462.

Per Cur. The variance in the name signed, and the name in the obligation, is not material, because subscribing is no essential part of the bond.

See 2 *Cro. Eliz.* 642; and *Gould v. Barnes*, post.

(C) AS TO THE SEALING.*

* This is an indispensable requisite; see *Dyer* 19 a; *Cro. Eliz.* 571; *Cro. Jac.* 420; 2

Signing is not essential to the validity of a bond.

1. ADAM v. KERR M. T. 1798. C. P. 1 B & P. 360.

On oyer of a bond made in Jamaica, which the plaintiff had described in his declaration as sealed, it appeared that no seal had been affixed, but that a mark had been made with a pen in place of the seal. Evidence was admitted to show that bonds were usually executed in that manner in Jamaica. The plaintiff had a verdict, and on a motion for a rule nisi for setting it aside, the Court intimated that the admission of this evidence afforded sufficient grounds for granting the rule, but recommended the defendant to allow the plaintiff to take judgment without costs, which was acceded to, and the point was not decided.

2. BALL v. DUNSTERVILLE. T. T. 1791. K. B. 4 T. R. 313.

On the general issue pleaded to a bill of sale, it appeared that the defendants were partners in the transaction, and that one only had executed the transfer, but that the other defendant was present during such execution and sanctioned the act of his co-partners. On a verdict passing for the plaintiff, a rule nisi for a new trial was obtained, and the defendant's counsel insisted, that independently of the presence of both parties, it was essential to a valid execution, that the seal should be placed on the wax by each, or as many times as there were parties to the deed. But the Court disallowed the objection, considering that the presence of the defendant, who did not execute was sufficient to show an acknowledgement and adoption of the deed on his part.—Rule discharged. See *W. Jones*. 268; 7 T. R. 207; 2 East. 142; 4 Esp. 220; Holt. N. P. C. 141.

(L) AS TO THE DELIVERY.

[603]

The delivery being merely indicative of the obligor's intention to adopt the bond as his deed, it is settled that if such design can be shown by circumstances, the bond will be obligatory on the party, without any formal act or verbal declaration that the party intends to deliver; *Co. Litt.* 36. a; 2 *Rol.* 24. b. 28. 45. Hence, if the obligor take up a bond placed, or thrown on a table, with intent to deliver, it will constitute a valid delivery; *Owen*. 95; *Cro. Eliz.* 122; 1 *Leon*. 140; 4 *Inst.* 136. a.

2. KEYME v. GOULSTON. M. T. 1663. K. B. 1 Lev. 140.

Assumpsit, in consideration that the plaintiff would put a child to school, the defendant would pay for her board for a year. And that he put out his daughter for three quarters of a year, which came to 10*l*. and that the defendant had not paid. After verdict for the plaintiff, it was moved in arrest of judgment, that the consideration is not performed; for when he promised to pay for a year, it ought to be intended that they should put her out to school for a year, otherwise the plaintiff might put her out for a week only, and yet oblige the plaintiff to pay for a year. *Per Cur.* It may be intended that he put her to school, and undertook to pay for a year or less, according to the time she stayed.—Judgment for plaintiff. See *Owen*. 95.

3. TALBOT v. HODSON. M. T. 1816. C. P. 7 Taunt. 251; S. C. 2 Marsh.

527.

A question arose in this case as to the finding by the jury of the proper delivery of a bond. The attesting witness, who was sister of the defendant, having denied the execution of it in her presence, and doubted whether the bond was sealed when she attested it, the defendant endeavoured to show, by evidence of her son, the co-obligor, but whom the plaintiff had released, she had not delivered the bond. This witness stated that the bond was read over to the defendant, that he thought she was ignorant of the nature of the instrument; and that positively it was not delivered; but he admitted he believed the bond to have been sealed.

Per Cur. This was clearly a question for the jury; for the words "signed, sealed, and delivered," being on the instrument, it was for them to determine whether they could infer from the evidence, that all the formalities which the *Co.* 5; 1 *Vent.* 70; 3 *Lev.* 34; 1 *Salk.* 141; 6 *Mod.* 306. therefore, if the seal of the obligor be removed, the bond is vacated as to that party; *Collins v. Prosser*, 1 B. & C. 682; abridged post 609.

And it may law requires were complied with.

4. A bond may be executed by any person on behalf of the obligor, provided such person be duly authorised by deed, or the obligor subsequently recognise the agents' act, and it may be delivered to any other person as well as the obligee; Perk. Fait. 137; Com. Dig. Fait. A. 3.

[604]

(M) AS TO THE WITNESSES.

SHOLTER V. FRIED. T. T. 2 W. & M. K. B. Carth. 142.

Per Holt, C. J. It was not necessary in any case at common law, that a proof of matter of fact should be made by more than one witness; for a single testimony of one credible witness is sufficient to prove any fact; the authorities cited by Sir Edward Coke, Co. Lit. 6 b. in support of his opinion to the contrary, are not adequate to that end. See 4 Rep. 201; F. N. B. 97. B.

II. RELATIVE TO THE STAMP.

(A) AMOUNT OF.]

1, ATTREE V. AYScombe. M. T. 1813. K. B. 2 M. & S. 88.

This was an action upon a bond conditioned for the payment of 1730*l.* by four quarterly payments of the yearly rent of 865*l.* from the rates arising

* The design of delivery being an absolute transfer of the power or right conferred by the deed, a delivery to a stranger will produce the usual effect; 2 Roll. 2 1 42; even although it was intended not to have operation till after a condition was performed; 2 ibid. 25. 1 90; 1 Lev. 152. But where a stranger receives a bond as an escrow, the peculiar nature of that mode of delivery, prevents the application of the general rule; Co Lit. 36 a, 2 Roll 25. 1. 25.

† And the law, in general, does not necessarily require any subscribing witness, unless it be in the case of bail-bond.

‡ By the 55 Geo. 3. c. 184. a duty is imposed on any bond in England, and personal bond in Scotland, given as a security for the payment of any definite and certain sum of money;

Not Exceeding
Exceeding

	Duty.
£ 50 0 and not exceeding	£1 0 0
100 0	1 10 0
200 0	2 0 0
300 0	3 0 0
500 0	4 0 0
1000 0	5 0 0
2000 0	6 0 0
3000 0	7 0 0
4000 0	8 0 0
5000 0	9 0 0
10000 0	12 0 0
15000 0	15 0 0
20000 0	20 0 0
	25 0 0

Bond in England, and personal bond in Scotland, given as a security for the payment of any sum or sums of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:

Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit

25 0 0

And where the money secured, or to be ultimately recoverable, thereupon shall be limited not to exceed a given sum.

{ The same duty as on a bond for such limited sum.

{ The same duty as on a bond for a sum of money equal to the value of the stock or fund secured, according to the average price thereof on the day of the date of the bond, or on either of the ten days preceding.

Bond in England and personal bond in Scotland, given as a security for the transfer, or re-transfer, of any share in any of the Government or Parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the bank of England, or of the East India Company, or of the South Sea Company.

Heritable bond in Scotland, for any of the purposes aforesaid; see Mortgage.

from a market for two years certain. On the bond being produced at the trial, it appeared only to have a 3*l.* stamp. It was objected that it ought to have had a 4*l.* one attached to it, as being within the schedule part i. of the statute 48 Geo. 3 c. 149. The plaintiff was accordingly nonsuited; and on a motion

stamped ac-
cording to
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[605]
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Bond in England, and personal bond in Scotland, given as a security for the payment of any sum of money, or for the transfer, or re-transfer, of any share in any of the stocks or funds before mentioned, which shall be in part secured by a mortgage or wadset, or other instrument or writing hereinafter charged with the same duty as a mortgage or wadset, bearing even date with such bond, or for the performance of covenants contained in such mortgage or other instrument, or writing or for both those purposes.

£ 1 0 0

Bond in England, and personal and heritable bond in Scotland, given as the only or principal security for the payment of any annuity, upon the original creation and sale thereof; see Conveyance upon the Sale of Lands, &c.

1 0 0

Bond in England, and personal bond in Scotland, given as a collateral or auxiliary security for the payment of any annuity, upon the original creation and sale thereof, where the same shall be granted or conveyed, or secured, by any other deed or instrument liable to and charged with the *ad valorem*, duty hereinafter imposed on conveyances upon the sale of any property.

1 0 0

Bond in England, and personal and heritable bond in Scotland, given as a security for the payment of any annuity, except as aforesaid, or of any sum or sums of money, at stated periods, (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack,) for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained:

Where the annuity or sum secured shall not amount to 10*l.* per annum. And where the same shall amount to 10*l.* and not amount to 50*l.* per annum

1 0 0

And where the same shall amount to 50*l.* and not amount to 100*l.* per annum.

£ 2 0 0

And where the same shall amount to 100*l.* and not amount to 200*l.* per annum.

3 0 0

And where the same shall amount to 200*l.* and not amount to 300*l.* per annum

4 0 0

And where the same shall amount to 300*l.* and not amount to 400*l.* per annum.

5 0 0

And where the same shall amount to 400*l.* and not amount to 500*l.* per annum.

6 0 0

And where the same shall amount to 500*l.* and not amount to 750*l.* per annum.

7 0 0

And where the same shall amount to 750*l.* and not amount to 1000*l.* per annum.

9 0 0

And where the same shall amount to 1000*l.* and not amount to 1500*l.* per annum.

12 0 0

And where the same shall amount to 1500*l.* and not amount to 2000*l.* per annum.

15 0 0

And where the same shall amount to 2000*l.* per annum, or upwards.

20 0 0

But where there shall be both a personal and heritable bond in Scotland in separate deeds of the same date, for securing any such annuity, or sums payable at stated periods, and the *ad valorem* duty above charged thereon, shall amount to 2*l.* or upwards, the heritable bond only shall be charged with the *ad valorem* duty, and the personal bond shall be charged only with the duty of.

1 0 0

Bond, (commonly, called counter-bond, in England, and personal bond of relief in Scotland, for indemnifying any person who shall have become bound or engaged as surety, or cautioner, for the payment of any sum of money or annuity, or for the transfer of any share in any of the stocks or funds before mentioned.

1 15 0

Bond in England, and personal bond in Scotland, for the due execution of an office, and to account for money received by virtue thereof.

1 15 0

Bond given pursuant to the directions of any act of parliament, or by the direction of the Customs or Excise; or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto.

1 0 0

Bond entered into by any person on obtaining a marriage license

1 0 0

Bond on obtaining letters of administration in England, or a confirmation of testament in Scotland.

1 0 0

[606] to set aside the nonsuit, it was contended, that the security in question was not "a bond given on a security for the payment of any definite and certain sum of money," but for the payment of rent, which is uncertain, and may be sus-

Bond accompanied with a deposit of title deeds for making a mortgage, wadset, or other security, on any estate or property, therein comprised. See tit. mortgage.

Back bond, declaration, or other deed in writing, for making redeemable any disposition, assignation or tack, apparently absolutely, but intended only as security. See tit. Mortgage.

Bond in England, and personal bond in Scotland, of any kind whatever not otherwise charged in this schedule, nor expressly exempted from all stamp duty.

1 15 0

Heritable bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty,

1 15 0

General directions respecting bonds.

Where any such bond as aforesaid,, together with any schedule, receipt or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of.

1 5 0

And where any such bond as aforesaid shall be given as a security for the payment of a sum of money, and also of a share in any of the stocks or funds before mentioned, or an annuity, or both, or for the payment of an annuity, and also of a share in any of the said stocks or funds, the proper *ad valorem* duty shall be charged in respect of each.

And where any such bond as aforesaid shall be given as a security, for the payment or transfer to different persons, of separate and distinct sums of money, or annuities or shares in any of the stocks or funds before mentioned, the proper *ad valorem* duty shall be charged in respect of each separate and distinct sum of money, or annuity, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof.

And where any bond in England shall be given as a security for the performance of any covenant or agreement, for the payment or transfer of any sum of money, or annuity, or any share in any of the stocks or funds before mentioned, such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such money, or annuity, or share in the said stocks or funds.

And where in England any bond for the payment or transfer, or for the performance of any covenant for the payment or transfer of any sum of money, or annuity, or any share in any of the stocks or funds before mentioned, shall be contained in one and the same deed or writing, with any other matter or thing in this schedule specifically charged with any duty (except any declaration of trust of the money, annuity, stock, or fund, secured,) such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with if contained in separate deeds.

But where in England a bond for the performance of covenants or agreements (other than for the payment or transfer of any sum of money, or annuity, or any share in any of the said stocks or funds), shall be contained in the same deed or writing, with any other matter or thing, the same shall not be charged separately, but the whole shall be considered as one deed, and be charged accordingly under its proper denomination.

Exemptions from the preceding and all other stamp duties.

Bonds of the Royal Exchange and London Assurance Corporations, exempted from stamp duty, by the act of 6 Geo. 1. under which they were incorporated.

Bonds and other securities exempted from stamp duty by the 26th Geo. 3. c. 81. s. 31. or any other act now in force, for the encouragement of the British fisheries.

Bonds exempted from stamp duty by the act of the 28th year of his late majesty's reign, or any other act now in force, relating to the exportation of wool, or any manufacture thereof, or fuller's earth, fulling clay. or tobacco-pipe clay; or by the act of the 29th year of his late majesty's reign, or any other act now in force, relating to the exportation of tobacco from his majesty's warehouses.

Coast bonds, or bonds relative to the carrying of goods and merchandize coastwise, whether the same shall be given pursuant to the act of the 32d year of his majesty's reign, or any other act now in force, for the relief of the coast trade of Great Britain, or pursuant to the directions of any proclamation or order in council, by his majesty, heirs, or successors.

Bonds and other securities exempted from stamp duty by the act of the 32d year of his late majesty's reign, or any other act now in force, for the encouragement of friendly societies.

Bonds given by cardmakers, for securing the stamp duties on playing cards.

Bonds given by the proprietors, printers, or publishers of newspapers, for securing the payment of the duties upon the advertisements therein contained.

Bonds given by stationers and others who sell stamped paper for the printing of newspapers, for the due performance of the matters required of them by the act passed in the 38th year of his late majesty's reign, for regulating the printing and publication of newspa-

pended by eviction, and depends altogether on the continuance of the tenancy. [607]
Per Cur. There is clearly a bond for the payment of a definite and certain sum, though payable at future periods.—Rule to set aside the nonsuit refused.

2. SCOTT v. ALLSOPP. M. T. 1815. Ex. 2 Price. 20.

Action on a bond in a penalty of 4,950*l.* conditioned, that if they (the obligors) or either of them should pay the plaintiff "all and every such sum or sums of money as they now stand indebted to the said J. B. Scott, or which they shall or may hereafter owe or stand indebted on account current to the said J. B. Scott, his executors, administrators, or assigns," then, &c. then, &c. The plaintiff was nonsuited, on the ground that the bond being engrossed on 7*l.* stamp, had not been duly stamped as directed by the 48 Geo. 3. c. 149. which imposes on "bond in England, and personal bond in Scotland, given as a security for the repayment of any sum or sums of money to be advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be, where the total amount of the money secured or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 20*l.* And where the money secured or to be ultimately recoverable thereupon, be limited not to exceed a given sum, the same duty as on a bond for such limited sum." So a bond conditioned for the payment of all sums of money advanced, ought to be stamped as for an unlimited sum, [608]

On motion for a new trial, the Court said, this case entirely depends on the statute of George. The act looks to the general nature of the security, and has no reference to the penalty. Nothing is more frequent than persons, becoming security for others in an uncertain sum, guarding themselves by limiting their engagement to an express amount, and providing, (if the instrument be a bond) by the condition, that as soon as so much shall have been paid, their liability shall cease. In that case, the duty imposed by this act on such bonds would be measured by the amount of the limitation; but where there is no such limitation so expressed, the sum secured is uncertain and without limitation, and from the nature of the security, is subject to the highest duty. Now, we take this to be exactly such an instance, and therefore this bond is precisely that which was meant by the act to be made liable to the largest duty. If, as soon as 1000*l.* had become due, the plaintiff sued on the bond, and had been paid, although he could not have ultimately have recovered at law more than the penalty; yet if, on the commencement of each successive suit, he had *toties quoties* received so much, the bond would have in the end secured to him a much larger sum than the amount of the penalty; and therefore we think that the bond should have borne the stamp to be imposed on such as are liable to the highest duty of 20*l.*—Rule discharged.

3. HUGHES v. KING. M. T. 1815. K. B. N. P. 1 Stark. 119.

A bond stamped with a 20*s.* stamp, after reciting that the defendant had sold a term of 21 years in a public house for 1000*l.* contained a condition that the defendant was not to convert it into wine vaults under a penalty of 500*l.* On an objection as to the sufficiency of the stamp, on the ground that a 2*l.* one was necessary, since it was either a bond for the payment of the penalty, or for the repayment of part of the sum advanced. But a bond conditioned not to convert a house to a particular purpose, does not require an *avalorem* stamp.

Lord Ellenborough, C. J. held the stamp sufficient, observing, that the bond was not within the description of instruments alluded to, because it could not be termed a security for a definite sum, when it was a penalty which might cover a number of breaches, and where the sum itself was payable only upon a contingent event; neither was it for the repayment of a definite sum.

4. CAETER v. BOND. H. T. 1803. K. B. N. P. 4 Esp. 253.

Bonds given by collectors of assessed taxes and their sureties, for the due payment of moneys collected by them, or otherwise relating to their offices.

Administration and confirmation bonds, given by the widow, child, father, mother, brother, or sister of any common seaman, marine, or soldier, who shall be slain or die in the service of his majesty, his heirs, or successors.

Administration bond in England, given by any person where the estate to be administered shall not exceed 20*l.* in value.

Confirmation bond in Scotland, where the whole personal estate of the deceased shall not exceed 20*l.* in value.

And a bond conditioned for the production of a box containing the subscrip

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tions of a benefit club is within the exemption on the 33 Geo. 3.

Action on a bond conditioned for the safe custody and production of a box containing the subscriptions of a benefit club. Ereach, that the defendant, who was entrusted with the care of it, delivered it with the locks broken, and 82l. 10s. short of the right amount. It appearing that the bond was not stamped, an objection was taken, to which it was replied, that the friendly society act, 33 Geo. 3. c. 54. exempted such a bond from the duty. And Lord Ellenborough, C. J. concurred in this opinion, after perusing the 4th section of the act, "no bond or other security to be given to or on account of any such society. or in pursuance of this act, shall be charged or chargeable with any stamp duty whatever."

(B) AS TO THE NUMBER OF STAMPS WHEN THERE ARE SEVERAL OBLIGORS.

BOWEN v. ASHLEY. E. T. 1805. C. P. 1 N. R. 274. S. P. GODSON v. FORBES. E. T. 1815. C. P. 1 Marsh. 531.

If several persons are bound under one penalty for the performance of the same matters, one stamp is sufficient.

A bond was given by several persons to the plaintiff, to secure the joint and several singing and performance of them, and each of them, at a certain society, called the Bath Harmonic Society. It was objected on the trial, that the bond had on it only one stamp, whereas it should have had one for each obligor; it was, however, admitted to be read; and the plaintiff had a verdict, subject to a motion by the defendant to enter a nonsuit. On a rule nisi for that purpose, the Court were of opinion, that as the engagement would never have been made with one of the obligors, that he should perform singly the bonds of all of them to the same object, being the consideration of the obligation entered into by each singly, the bond must be considered as single, and therefore needed but one stamp.—Rule discharged. See ante, vol. i. p. 371.

(C) EFFECT OF STAMP BEING IMPROPER.*

A stamp of sufficient value, though of an improper denomination, will suffice.

Unless it be specially appropriated to a particular instrument.†

By the 55 Geo. 3. c. 184. s. 10. it is enacted, "that instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole, with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument by having its name on the face thereof."

(D) TIME OF STAMPING.

It is sufficient if the instrument bears a proper stamp when it is produced upon the trial, although it was not stamped when it was executed, or when produced on a former occasion; 1 Stra. 624; 7 Taunt. 147; 2 Marsh. 485; and the adversary cannot show that the instrument was not stamped when made; see Peake. 173; Stra. 624; unless the commissioners are expressly prohibited from subsequently affixing a stamp; see 3 Campb. 103.

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III. RELATIVE TO THE PARTIES.

1st. IN GENERAL.

All persons having legal capacity to contract, in general, may bind themselves in bonds and obligations; see 5 Co. 119; 4 Co. 124; Roll. Abr. 340.

2d. IN PARTICULAR INSTANCES.

(A) AGENTS.

TALBOT v. GODBOLT. — Yelv. 137.

An agent by executing a bond in his own name, is liable as principal.‡

An agent made a bill in this form; memorandum, "that I have received of E. Talbot, to the use of my master, Serjeant Gaudy, the sum of 40l. to be paid at Michaelmas following," and thereto set his seal. This was holden a

* If the stamp be insufficient, it is a ground of nonsuit; see 2 M. & S. 88; 2 Price. 20; 1 Stark. 119; 4 Esp. 258. The objection must be taken at the trial before the instrument is read; and the party objecting ought to be prepared with the statute which requires the stamp, and capable of sustaining his objection by collateral proof where it is necessary.

† Hence in Robinson v. Drybrough, 6 T. R. 317. it was holden, that articles of agreement under seal could not be received in evidence, being stamped with an agreement stamp of the same value, but differently formed; see 1 East. 55; 1 N. R. 30; 2 East. 414; 1 Esp. 292; 5 East. 309; 2 M. & S. 333.

‡ And he cannot bind the latter by entering into an obligation, unless he was authorised, by deed, to execute such an instrument; see 7 T. R. 209; 2 B. & P. 388; and *post*, tit. Principal and Agent.

good obligation to bind himself; for though in the beginning of the deed, the receipt is said to be to the use of his master, yet the condition to repay is general, and must necessarily bind him who sealed, and not the serjeant, who was no party to the contract.

(B) ALIENS.

WELLS v. WILLIAMS. M. T. 1696, K. B. 1 Lord Raym. 282; S. C. 1 Salk. 46; S. C. Lutw. 35.

Action of debt on bond. The defendant pleads that the plaintiff was an alien enemy, born in France of French parents, who were alien enemies, and that he came into England *sine salvo conductu*, and concludes in bar. The plaintiff replies, that at the time of the making of the bond he was, and yet is, here *per licentiam et sub protectione domini regis*. The defendant demurs; and Wright, Serjeant, objected that it appears that the plaintiff is an alien enemy, and came here *sine salvo conductu*. He admitted that an alien enemy, who comes here with safe conduct, may maintain an action. But unless there is a safe conduct, though it be *per licentiam et protectionem*, he cannot maintain an action; for by the same reason a captive or prisoner of war may maintain an action. But to that it was answered and resolved, that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens, and that the plaintiff was entitled to sue. See Co. Lit. 129. b; Moore. 431; Cro. Eliz. 142. 683; Cro. Car. 9; ante, tit. Alien; Alien Enemy.

An alien enemy, under safe conduct, may be the obligee in a bond, and sue, there on.

(C) CORPORATIONS.

Sole corporations, as bishops, prebendaries, parsons, vicars, &c. cannot be obligees in their ecclesiastical character; and therefore a bond made to such persons shall enure to them in their natural capacities; see 4 Co. 65; Cro. Eliz. 464; but a corporation aggregate may take bonds, &c. in its political capacity, which shall go in succession, such corporation being always in existence; see Dyer. 48. a; Cro. Eliz. 464; Co. Lit. 9. a 46. b; Hob. 64; Roll. Abr. 515.

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(D) EXECUTORS OR ADMINISTRATORS.

Executors or administrators, by entering into a bond, are personally liable, though they make it expressly as *executors*, and though they have fully administered the testator's assets; see 5 Moore. 282; S. C. 2 B. & B. 460; 1 T. R. 487; 2 H. Bl. 618; 6 T. R. 591; *post*, tit. Executors and Administrators.

(E) IDIOTS, LUNATICS, AND DRUNKARDS.

YATES v. BORN. M. T. 1738. K. B. 2 Stra. 1104.

In debt upon articles, defendant pleaded *non est factum*, and offered to give lunacy in evidence; which *L. e. C. J.* admitted on the authority of Thompson v. Leech, 2 Vent. 198. and the plaintiff was nonsuited. See Cro. Eliz. 398; id. 622.

The bond of an idiot or lunatic,

COLE v. ROBINS. 1703. Cited Bull. N. P. 172. a.

In debt on bond, the defendant was suffered to give in evidence that it was made when he was drunk, and that he did not know what he did. See 3 Campb. 133; 1 Stark. 126; 1 Ves. 19.

Or a person in a state of inebriety, is void.*

(F) INFANTS.

1. RUSSEL v. LEE. M. T. 1661. K. B. 1 Lev. 86. S. P. JEWSON v. READ. Cited 4 T. R. 363.

An infant cannot bind himself in a bond with a penalty, even for necessities.†

To debt on a single bill, the defendant pleaded infancy; the plaintiff replied that it was for victuals and necessary clothes delivered to him, and suitable to his quality. On demurrer, it was argued, that the bill was void as well as an obligation; to which it was replied and resolved by the Court, that his single

* And advantage may be taken of the disability under the plea of *non est factum*; the ancient rule, that a person *non compos mentis* could not avoid his bond by reason of insanity, because no man shall be allowed to stultify himself in consequence of the inconvenience that might attend counterfeit madness, (4 Co. 124.) no longer prevails.

† Because a contract which is prejudicial to infants is absolutely void; see Cro. Eliz. 920; 3 M. & S. 477; and it can never be beneficial to enter into a contract with a penalty; *ibid*.

bill for necessities was good, but that an obligation with a penalty was void; Co. Lit. 172; Cro. Car. 920.

2. FISHER v. MOWBRAY. E. T. 1807. K. B. 8 East. 330.

Therefore
in no case
is he liable
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for interest
secured on
a bond.*

The defendant, an infant, had bound himself in a bond with a penalty conditioned for the payment of a certain sum of money with interest, at the rate of five per cent, to which he pleaded his minority. It was contended by the plaintiff's counsel, that as an infant might bind himself by single bill for necessities, he might by bond; for since the construction put on the statute 8 & 9 W. 3. c. 11. in the cases of *Rolls v. Roleswell*, 5 T. R. 538. and *Walcot v. Golding*, 8 T. R. 126. all bonds with a penalty were no more than a single bill; that, therefore, an infant could not be prejudiced by the form of the security before the Court; and that even allowing he was not liable at all for the payment of interest, that would not avoid the obligation, but only go to the *quantum* of damages. But the Court decided in favour of the defendant, observing; that the judgment must be for the sum due on the bond, and part of that was due for interest, for which an infant could not give a security, which of itself was sufficient answer to the action, even allowing that, since the statute of William, a bond in a penalty with a condition could be viewed as a single bill.

(G) MARRIED WOMEN.

The bond of a *feme covert* is *ipso facto* void, and neither binds her nor her husband; Bac. Ab. Barron and Feme, M. But she may be obligee, if the husband assents; but if he disagrees, the obligation loses its force, so that afterwards the obligor may plead *non est factum*; but if he neither assents nor disaffirms, the bond is good, for his non-interference shall be deemed a tacit consent; see 5 Co. 119. b; Co. Lit. 3. a.

(H) PARTNERS.

The authority of one partner to bind the firm is confined to cases of simple contract; he cannot, therefore, bind it by bond, unless express power to that effect be given, or he be present at the execution and delivery of the deed; *Harrison v. Jackson*, 7 T. R. 207; and *Thompson v. Frere*, 10 East. 418; *Ball v. Dunsterville*, *ante*, p. 603.

3d. EFFECT OF AN INCOMPETENT PERSON BECOMING A PARTY.

If an infant *feme covert*, or other incompetent persons, bind themselves in bonds, together with a stranger, who is under none of the disabilities, it shall bind the stranger, though it be void as to the infant, &c.; see Roll. Rep. 41.

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The want
or inadequacy
of the
consideration
is no
objection to
a bond,†
but any illegality
in it
vitiates the
security.

IV. RELATIVE TO THE CONSIDERATION.

1st. OF THE NECESSITY FOR, AND WHEN WANT OF, OR INADEQUACY OF VITIATES.

FALLOWES v. TAYLOR. H. T. 1797. K. B. 7 T. R. 447.

Per Lord Kenyon, C. J. The want of a consideration to a bond affords no ground of objection; but if there be any thing *illegal* in the consideration, the defendant is entitled to plead it in bar to the action.

* And the contract being void, it is incapable of confirmation by him when of age, for confirmation implies the existence of the particular thing to be confirmed; therefore if he wish to restore his liability, he must re-execute the bond, not as having satisfied the former contract, but as having made a new one; *Baylis v. Dineley*, 3 M. & S. 477. abridged *post*, Infant.

† There is a remarkable distinction in this respect between bonds and other instruments under seal, and simple or parol contracts. The general rule is, that it is essential to the validity of the former that it should be founded on a sufficient consideration, and that if it be merely voluntary or gratuitous without consideration, the agreement is *nudum pactum*; but where a security is under seal it is binding on the party by whom it is executed, although there was no consideration for making it. The reason for this difference is, that simple contracts are often entered into by men unadvisedly and without sufficient deliberation, and therefore the law has provided that such agreements shall not bind without consideration; but when the agreement is under seal there is more time for reflection; and as it has been observed with great simplicity, but at the same time with equal truth, when a man executes a bond, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the instrument as his

2d. WHEN ILLEGALITY OF VITIATES,* AND MODE OF TAKING ADVANTAGE THEREOF.

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(A) BY THE COMMON LAW.†

(a) Immoral.

1. WALKER v. PERKINS. M. T. K. B. 3 Burr. 1568; S. C. 1 Plac. 517.

Debt on bond against an administrator; upon oyer, it appeared that the bond contained the following recital; that whereas the intestate and plaintiff had agreed to live together, and that the former had agreed to find her meat, drink, washing, and lodging, &c. and to leave her an annuity of 60*l.* a year, if he quitted her, or she outlived him; and if they had any child he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity. The defendant pleaded that this was an agreement between the plaintiff and his intestate, "to live together in a state of fornication," and that a bond made in pursuance and support of an agreement "to live together in fornication," was void in law. In reply to this plea, the plaintiff alleged, that she was a virgin, and was seduced by the intestate; and in consideration thereof this bond was given to her by the intestate; and that it was *premium pudicitie*. To this replication the defendant demurred; For the plaintiff it was contended, that the condition consisted of two parts; one, "to live together in a state of debauchery;" the other, "to leave her an annuity," the former part was void; the latter good. The suit may therefore be supported upon the virtuous part, the paying her the annuity. For it is agreed in the case of *Chesman et ux. v. Nainby*, 2 Lord Raym. 1459; and 2 Stra 744; that the position laid down in *Hobart*. 14. (in the case of *Norton v. Simmes*) "that the common law, having made that void that is against law, lets the rest stand;" and deed, which is the consummation of his resolution; *Harrington v. Stratton*, Plowd. 308.—Thus it is that securities of this description are adjudged to be binding, without examining for what cause or consideration they were made; see *Bunn v. Guy*, 4 East. 200; 2 Bl. Com. 446; *Fonbl. on Equity*, 2d edit. 347. n. f. And although the Courts of equity will, under certain circumstances, postpone the payment of a voluntary bond, as where it interferes with the rights of creditors, yet it will not relieve the party from his obligation, unless he can impeach the transaction by express evidence of fraud; *Fonbl. on Eq.* 339; hence, where a second bond had been given in consideration of the surrender of a voluntary bond, such substituted bond is good as against creditors, unless the transaction be with a view to defraud creditors, by an insolvent person, for instance, endeavouring to substitute a valid for an invalid security; *ex parte Berry*, 19 Ves. 218.

A bond given in consideration of future illicit cohabitation, is illegal and void.

Consistently with these cases it has become a settled principle in the law of evidence, that an obligor is precluded from showing a condition or consideration contrary to what is expressed in the instrument. But to this rule an exception is always made where the consideration is illegal, as being contaminated with simony, usury, compounding felony, &c.; see *Fuckler v. Millard*, 2 Vent. 107; *Collins v. Blahtern*, 2 Wils. 347. Thus, in an action of debt upon bond, the defendant may plead that the bond was given for an unscrupulous consideration, though a different and a legal consideration be recited. And when fraud is imputed, the party who complains of the fraud may prove any consideration, however contrary to the averment in the condition or recital in the bond, to show the fraudulent nature of the transaction; *Bul. N. P.* 173; *Filmer v. Gott*, 4 Bro. Parl. Ca. 234. 2d edit. The exclusion of matters *dehors* the deed does not apply to such cases; the true meaning of that rule is, that matter inconsistent with, or contrary to, the deed, cannot be alleged, but matter consistent with the deed may; the bond in the present case is for the payment of money; the plea admits this, and the averment alleges upon what consideration that money was to be paid; and therefore is not inconsistent with, or contradictory to, the condition of the bond; this rule of pleading applies to the cases of simony, duress, coverture, infancy, &c. "Argument for defendant; in 2 Wils. 347. Since the case of *Pole v. Harrobin*, E. 22. G. 3. B. R. it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." Per Lord Ellenborough, C. J. in *Paxton v. Popham*, 9 East. 421-2.

* Although the adequacy of the consideration to a bond cannot be impugned by extrinsic evidence, yet we have seen in the immediately preceding notes, that when it is founded upon an *illegal* consideration (whether its illegality arises from the provision of the common or the statute law), such defect in the consideration may be pleaded in bar.

† At common law, any contract is invalid which violates the precepts of religion or morality, or the rules of public decency. Thus a bond conditioned that the obligor shall kill J. S. is void; *Co. Litt.* 206. b.

that where a bond is conditioned to do some things agreeable to common law, and others disagreeable to it, the breach may be assigned upon that part which is good. And here *præmium pudicitie* is a sufficient consideration. Lord Mansfield. It is the price of prostitution, *præmium prostitutionis*; for if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void.—Judgment for the defendant. See 2 Ves. 160; 5 Ves. 293.

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But one executed by way of reparation for the injury, and to put an end to the illegal intercourse is valid."

2. TURNER v. VAUGHAN. E. T. 1765. C. P. 2 Wils. 339.

In debt upon a bond, conditioned for the payment of 30*l.* *per ann.* from the defendant to the plaintiff, the consideration appeared to be for cohabitation had by the said above bounden, T. V. (the defendant) with the said C. T. (the plaintiff); to the declaration in this action, there was a general demurrer and joinder in demurrer; and on the argument, it was objected, that it appeared by the condition of the bond, that it was executed and given upon an illegal flagitious consideration of having cohabited with the plaintiff. But by the Court, without hearing the other side, there must be judgment for the plaintiff; the Court may take this for a lawful and conscientious consideration; we must presume that the defendant hath done what in honour and conscience he ought to have done, and that he thought himself a wrong doer, and gave the plaintiff this bond to make her amends. And per Clive, J. If a man has lived with a girl, and afterwards gives her a bond, it is good. Suppose this bond had been given by the defendant to the plaintiff, for being his mistress, it would have been good in point of law, although in a court of equity it would be postponed to creditors. Jekyll, Master of the Rolls in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is *præmium pudoris*, a court of equity will not relieve against such a bond. This condition is incapable of an explanation to make the bond an illegal act. See *Armondale v. Harris*, 2 P. Wms. 432.

(b) *Inrestraint of trade.*†

A bond that obligor should purchase certain articles only of certain persons, is void, as being in restraint of trade.

1. THOMPSON v. HARVEY. T. T. 1688. K. B. 1 Show. 2; S. C. Comb. 121; Holt. 674.

Debt on bond, with a condition not to buy sheeps' feet, &c. of any others but of certain persons named in the bond, and not to buy beyond a specified quantity, &c.; the defendant pleaded that his business was to buy sheeps' feet, &c. and that the bond was procured from him to restrain the use of his trade, and therefore of no force, but void in law; The plaintiff replied that it was given voluntarily. For the plaintiff it was contended that the condition was valid; as the business of the defendant was not such a trade as the law regards, and that admitting it to be a trade, yet the restraint was lawful, being

* And an agreement by a defendant to allow a woman with whom he had cohabited an annuity for life, in case they should separate, and provided she should continue single, was in one case holden valid; 3 M. & S. 463. But a declaration in *assumpsit*, stating that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour, & that thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant promised to pay as much as the annuity was reasonably worth, was held bad on demurrer, on the ground that the declaration did not state any sufficient consideration to found a promise; 4 B. & A. 650. Nor is a bill in equity sustainable against an executrix to enforce a parol agreement by the testator, when single, to settle an annuity on the plaintiff, a married woman, who had lived with the testator during the time of her separation from her husband; for such an agreement, if not illegal, is at most only a voluntary one; 1 Mad. Rep. 553.

† It is a very ancient part of the policy of the law to discourage restraints on trade, as being injurious to the public. But no judge has carried his abhorrence so far as is reported of Hull, J. in the Year Book, 2 Hen. 5. There a dyer was bound that he should not use his craft for two years, and Hull held that the bond was against the common law, "and by G—d (said he), if the plaintiff were here, he should go to prison till he had paid a fine to the king." In *Mitchell v. Reynolds*, 1 P. W. 181. Parker, C. J. in his admirable exposition of the laws, on this subject, excuses the transport of Mr. Justice Hall's indignation, on the ground that it was excited by a case of most gross fraud and villany.—

nly a particular species of restraint, and not universal. *Per Cur.* The bond is plainly restrictive of trade, for the obligor is not to deal with any person whatsoever, that the plaintiff has dealt with, and there is no difference between a restraint from a particular place, and from particular persons. See *Holcomb v. Hewson*, 3 Campb. 391; *Cooper v. Turbill*, 3 Campb. 286; *Jones v. Edney*, id. 285; 1 H. Bl. 289; 6 Vcs. 330; 12 East. 6; 8 Taunt. 529; 1 Leon; Dy. 353. b.

2. *MITCHELL v. REYNOLDS*. H. T. 1711. K. B. 10 Mod. 130; S. C. Fort 296; S. C. 1 P. Wms. 181. S. P. *CHESMAN v. NAINBY* H. T. 1726. K. B. 2 Stra. 739; S. C. 2 Lord. Raym. 1456. Forts. 297. S. P. *COLMER v. CLARK*. E. T. 1734. K. B. 7 Mod. 230. S. P. *TAYLOR OF EXETER v. CLARKE* E. T. 1683. 2 Show. 349.

Debt on bond; the defendant craved, and obtained an oyer of the condition which recited that the defendant had assigned to the plaintiff a lease of a messuage and bake-house in Liquorpond-street, in the parish of St. Andrews, Holborn, for the term of five years, and provided that if the defendant, should not exercise the trade of a baker within the parish during the said term, or in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of 50*l.*, then the bond should be void. The defendant then pleaded that he was a baker by trade, that he had served an apprenticeship to it, by reason whereof the bond was void; wherefore he traded as it was lawful for him to do. On demurrer, the Court adjudged the bond to be good, on the ground that from the particular circumstances and consideration set forth, the contract appeared to be lawful and useful, and that the restraint was a particular restraint founded on a valuable consideration.

3. *CHESMAN v. NAINBY*. H. T. 1726. K. B. 2 Stra. 739; S. C. 2 Lord Raym. 1456; S. C. Fort. Rep. 297.

Error of a judgment in C. B. in an action of debt upon a bond entered into by the wife *dum sola*; the defendants crave oyer of the condition, which is set forth in *hec verba*; Whereas the above-named M. N. at the special instance and request of the above-bound E. V. is to take her the said E. V. for her hired servant, to attend in her shop, and to inspect her customers there, and to show her goods, and further to stand by and assist her the said M. N. in her said trade and business of a linen draper, whereby it is presumed the said E. V. if she continues any length of time in the said service of the said M. N. may become a perfect and knowing person in the said trade and mystery; and whereas the said M. N. consents to have the said E. V. in consideration only of the express promise and agreement of the said E. V. that she the said E. V. shall not nor will at any time after she shall have left the service of the said M. N. set up or exercise the trade or mystery of a linen draper. either by herself or by any other person or persons in trust for her use, either directly or indirectly, in any shop, room, or place, within the space of half a mile of the said now dwelling-house of the said M. N. situate in Drury-lane, or any other house that the said M. N. her executors, or administrators, shall think proper to remove to, in order to carry on the said trade of a linen-draper; nor shall she the said E. V. within the same space of half a mile, directly or indirectly be concerned in or assist or instruct any other person or persons in the managing and carrying on the said trade, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatsoever; which said express promise and engagement, joined with the good character and opinion that she the said M. N. hath in the integrity and honesty of her the said E. V. is the sole consideration and inducement that has obliged the said M. N. to take the said E. V. into her service for the space of

As to the general doctrine, see *Davis v. Mason*, 5 T. R. 118; *Chesman v. Mosely*, 1 Bro. P. C. 234; *Shackle v. Baker*, 14 Ves. 468; *Crattwell v. Lye*, 17 Ves. 835; *Harrison v. Gardner*, 2 Madd. 198.

* Yet where the condition of a bond was, that if defendant's son should follow the business of an haberdasher within the county of Kent, or city of Rochester, or Canterbury, that he should pay to the plaintiff 20*l.* it was adjudged to be void; *Colgate v. Batchelor*, Cro. Eliz. 872.

So a bond generally that he should not exercise his trade is void, but not if the restriction be confined to a limited district.*

As within half a mile from the place of the obligor's residence.

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three years. Now the condition of the above obligation is such, that if the said E. V. shall act contrary to and in breach of the above recited promise and agreement, according to the true intent and meaning thereof, or of any part thereof, that then and in such case the said E. V. her executors or administrators, shall thereupon pay, or cause to be paid unto the said M. N. her executors, administrators, or assigns, the full and just sum of 100*l.* of good and lawful money of Great Britain, without fraud or further delay, the said sum of 100*l.* being the consideration money, which it is computed the said M. N. might reasonably expect with an apprentice to the said trade; that then this obligation to be void, otherwise to be and remain in full force and virtue in law." *Quibus lectis* they plead that the defendant E. V. entered into the service, and continued from the time of the bond, to 28th April, 1724; that the plaintiff continued to live in Drury-lane to the bringing the action, and exercised her trade there, and that the defendant did not set up the trade, or instruct any body, within the bounds mentioned in the condition. To this the plaintiff replied, that the defendant E. V. took the other defendant to husband, and did, within half a mile of the plaintiff's house in Drury-lane, instruct her husband in the trade, upon which they are at issue, and it is found for the plaintiff, and on a writ of error in B. R. judgment was affirmed, upon the authority of *Mitchell v. Reynolds*, *ante*, 616.

4. DAVIS v. MASON. H. T. 1793. K. B. 5 T. R. 118.

Or even
ten,
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In an action on a bond reciting that in consideration that the defendant was to be employed as an assistant to the plaintiff in his profession of a surgeon, &c. he, the defendant, agreed not to use and enjoy the business of a surgeon, &c. within ten miles of T. where the plaintiff resided. After an untenable special plea, the Court said, as the limits were not unreasonable, which, according to the case of *Mitchell v. Reynolds*, 1 P. Wins. 181. was the only criterion in such cases; and the bond being founded on a valuable consideration, they should hold the bond to be legal, and binding, on the defendant.

5. HAYWARD v. YOUNG. M. T. 1818. K. B. 2 Chit. Rep. 407.

Or twenty
miles;

A bond conditioned not to set up as surgeon or man midwife in the town of Aylesbury, or within 20 miles. Upon its being objected that the bond was void, as in restraint of trade, Abbott. C. J. said, May not the business of an apothecary extend for 20 miles, and might not the setting up within that distance be injurious to him? This bond is clearly valid, according to the case of *Mitchell v. Reynolds*, *abridged ante*, 616.

6. CLERKE v. COMER. T. T. 1734. K. B. Ca. Temp. Hard. 53; S. C. by the name of *COLMER v. CLARK*, 7 Mod. 230.

Or not to
carry on
trade with
in the city
of West
minster or
bills of mor
tality.*

Debt on articles in C. P. that the defendant taught the plaintiff his trade, on condition that he would not set up within the city and liberty of Westminster, and bills of mortality, under a penalty. Judgment for the plaintiff, which was subsequently confirmed on error to the House of Lords.

(c) *In restraint of marriage.*

LOW v. PEERS. E. T. 1768. K. B. 4 Burr. 2235.

Bonds ope
rating in re
straint of
marriage,
are void;

The defendant gave to the plaintiff a promise of marriage, under seal, in these words; "hereby I promise Mrs. Catherine Low, that I will not marry any person beside herself; if I do, I agree to give her 1000*l.* N. Peers." Defendant having married another person, was sued on this covenant, and plaintiff had a verdict; but judgment was arrested, for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him; and being thus restrictive of marriage, was adjudged void. See 2 Vern. 102. 215; 2 Eq. Ca. Abr. 248; 1 Atk. 287; 2 id. 539. 540; 10 Ves. jun. 429; 10 East. 22; 3 M. & S. 463.

* And in *Bunn v. Guy*, 4 East. 190. an agreement entered into by a practising attorney in London, to relinquish his business, and recommended his clients to two other attorneys for a valuable consideration, and that he would not himself practise in such occupation *within London and 150 miles from thence*, and that he would permit them to make use of his name, in their firm for one year, was holden a valid contract; and in *Bryson v. Whitehead*, 1 S. & S. 74. it was holden by the Vice-Chancellor, that a trader may sell a secret

(d) *To procure marriage.*

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HALL v. KEENE. H. T. 1693. Dom Proc. 3 Lev. 411; S. C. Show. P. C. 76; Bro. P. C. 144.

Debt on bond conditioned to pay the plaintiff 500*l.* within three months after A. B. should marry Lady Oyle, a lady of large property. The defendant, the executor of A. B. pleaded that the latter was never married to Lady O. Issue being taken upon this point, the jury found for the plaintiff; and on a bill filed by the defendant in Chancery, the Lord Chancellor thought the bond valid, and refused to grant relief; but upon appeal to the House of Lords, that tribunal was of opinion that all such contracts concerning marriage, were of dangerous consequence, and not to be allowed, and reversed the decree of the Chancellor.

Or given to procure marriage;*

(e) *To refund part of a marriage portion.*

TURTON v. BENSON. M. T. 1719. Chan. 1 Stra. 240.

Bonds given to refund part of a marriage portion, are void as a fraud on the contracting parties.

Or to refund a part of a marriage portion.

(f) *To compound a criminal prosecution.*

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COLLINS v. BLONTHORN. 2 Wils. 344.

This was an action of debt on bond, dated the 6th of April, 1765, in which defendant was jointly and severally bound with A. B. in the penal sum of 700*l.* conditioned for the payment by A. and B. and the defendant, of the sum of 350*l.* on the 6th of May following. The defendant having prayed oyer of the bond and condition, pleaded that two of the obligors, A. and B. and three other persons, stood indicted by John Rudge, on five several indictments, for wilful and corrupt perjury, and had severally pleaded not guilty; that the several traversers on the indictment were coming on to be tried at the assizes in Stafford, whereupon it was unlawfully and corruptly agreed between Rudge, the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his note for 350*l.* payable one month after date, for not appearing to give evidence on the trial, and the obligors should execute a bond to the plaintiff of the same date with the note, as an indemnity to the plaintiff in his trade, and restrain himself generally from the use of it; and his honour in this case decreed a specific performance of an agreement to sell all the good will of a trade, and the exclusive use of a secret in dyeing, the Master being directed, in settling the deed, to introduce a general covenant to restrain the use of the secret for 20 years, and a limited covenant in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing that the agreement should be so modified.

Or a bond given to compound a criminal prosecution;

* The civil law allowed the *proxenetae*, or match makers, to receive a reward for their pains; 1 Bro. Civil Law, 79; and Lord Somers decreed in favour of a bond for procuring a marriage, the procuring of a marriage being a good consideration at law for an *assumpsit*. See Griesley v. Lother, Hob. 10; and what Holt, C. J. says, in Hull v. Potter, 3 Lev. 411; but see Collins v. Blanthorne, 2 Wils. 347; but his decree was reversed in the House of Lords; Potter v. Kean, or Hall, Show, Cas. Parl. 76. noticed 3 P. Wms. 76. & 392; and it is now clearly settled, that equity will relieve against bonds given for the procuring of a marriage; Drury v. Hook, 1 Vern. 412; Arndel v. Trevillian, Ch. Rep. 87; Hall v. Potter, 3 Lev. 411; Sho P. C. 76; Granville v. Fenning, 3 Ch. Rep. 18; Toth. 26; Cole and Gibson, 1 Ves. 507; Smith v. Aykwell, 3 Atk. 566; and not only decree such bonds to be delivered up, but also a sum paid to be refunded; Smith v. Bruning, 2 Vern. 392; they being introductive of infinite mischief; 3 P. Wms. 394; and as relief, in these cases, is given on grounds of public convenience, such bonds do not admit of confirmation, though, perhaps (a sort of confirmation,) the remedy of the party may be released; Shirley v. Martin, mentioned in note 1. to Roberts and Roberts, 3 P. Wms. 74. and noticed in Fonbl. Eq. 265. The Court on these occasions does not interpose in respect of the particular damage to the party, but from a public consideration, marriage greatly concerning the public; Law and Law For. 142; S. C. MS., and more fully, in Debenham v. Or. 1 Ves. 277; Cole v. Gibson, 1 Ves. 506. Such bonds tend to introduce improvident marriages; and every contract relating to marriage ought to be free and open; Roberts v. Roberts, 3 P. Wms. 76; Debenham v. Or. 1 Ves. 277; and on this ground it is, that though the match be a proper one, yet the Court sets the bond aside. But for the ingredient of public policy the Court would set such bonds aside at the instance of the obligor, who is *particeps criminis*; and where the obligor has sought relief, costs have not been given; 1 Ves. 277. A bond given for assisting a clandestine marriage has been set aside, though given voluntarily after the marriage, and without any previous agreement for the same; Williamson v. Gibson, 2 Sch. & Lefr. 857.

for giving such note. The plea then stated the carrying this agreement into effect, on the 6th of April, 1765, and concluded with an averment that the bond was given for the said consideration, and no other, and that the obligors were not indebted to the plaintiff in any sum of money, and therefore the bond was void in law. On demurrer, the Court gave judgment for the defendant, on these grounds; 1st, That the whole transaction was to be considered as one entire engagement; for the bond and note were both dated on the same day, for payment of the same sum of money on the same day; that it was an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; that the promissory note was certainly void, and consequently the plaintiff was not entitled to recover upon the bond, which was given to indemnify him from such note; they were both bad, the consideration for giving them being wicked and unlawful. 2d, That the bond was void, because it was given for the purpose of tempting a man to transgress the law. 3d, That the special matter might be pleaded, although it was objected that the law would not endure a fact in *pais, dehors* a specialty to be averred against it, and that a deed could not be defeated by any thing less than a deed; for the condition in this case was for the payment of a sum of money; but that payment to be made was grounded upon a vicious consideration, which was not inconsistent with the condition, but struck at the contract itself in such a manner as showed that the bond never had any legal existence, and if it never had any being at all, then the maxim, that a deed must be defeated by a deed of equal strength, did not apply to this case. The averment pleaded in this case was not contradictory to, but explanatory of, the condition; as to the argument, that if there was not any consideration for the bond, it was a gift that was to be repelled by showing it was given upon a bad consideration; this destroyed the presumption of donation. 4th, That the plea was properly concluded, "and so the said bond is void," or at least this conclusion was well enough upon general demurrer.

(g) *To withhold evidence.*

MASON v. WILKINS. M. T. 1688. C. P. 2 Vent. 109.

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Or to with-
hold evi-
dence.

On oyer, it appeared that the obligor had bound himself not to bring any evidence at the assizes, to prove the two cows in question between O. N. and the defendant, to be the cows of the said defendant, or of R. G. and that R. G. should procure a bill of *ignoramus* that the bond should be void. The defendant pleaded these facts; and upon demurrer, judgment was given for the defendant, the condition of the bond being contrary to law, and to shift off evidence of felony, and the Court recommended one of the Welch judges to have the plaintiff prosecuted. See 3 T. R. 17; 6 id. 134; 1 Leon. 180; 5 East. 299; 2 Wils. 349; 1 Stark. 467; 3 Esp. 253; 5 T. R. 405; 7 id. 335; 8 id. 577; 8 East. 381; Hob. 106.

(h) *To restrain an officer in the execution of his duty or office.*

NORTON v. SIMES. Hob. 12.

Where particular powers or rights are annexed to any office by limiting the exercise of those powers are void. The plaintiff, who was sheriff of Hampshire, on his appointing a person as his under sheriff, took a bond from him and defendant as his surety; one condition of which was, "that the under sheriff should not execute any extent, liberate, *elegit*, or other process of execution, for any sum above 20l. without first acquainting plaintiff (the sheriff) with the same, and getting his special warrant for the execution." In debt on this bond, defendant demurred; when it was resolved, that the office of under sheriff is of long use; and as deputy to the sheriff, he is invested with all the rights of office of the sheriff himself; such as executing process, executions, &c. that the sheriff therefore cannot make an under sheriff, without giving him those powers, nor abridge him of any part of them. That this condition, therefore, being to deprive the under-sheriff of one of the rights annexed by law to his office, was illegal and void. See Parker v. Rett, 1 Salk. 95.

(i) *Illegal traffic.*

LIGHTFOOT v. TENANT. M. T. 1796. C. P. 1 B. & P. 551.

A bond given to secure the pay

Debt on money bond. After oyer, the defendant pleaded *non est factum*,

and five other pleas. The fourth stated that the plaintiff and defendant, before the making of the said bond, were subjects of this realm, and that it was unlawfully agreed between them, that the plaintiff should sell to the defendant certain goods to be shipped by the defendant, and conveyed from the port of London to Ostend, and to be from thence shipped to Calcutta, without the license of the East India Company, and that the plaintiff, well knowing that the goods were to be carried to Calcutta, and then sold, and that for securing the payment of the prices of the said goods, the defendant did make and seal the bond, &c.; and which said bond, for the cause aforesaid, was void in law. After verdict for the defendant, on this and another similar plea, and a rule nisi for entering judgment for the plaintiff, it was contended in support of the pleas that the bond being contrary to the 7 Geo. 1. s. 1. c. 21. which enacts, that all contracts and agreements made by any of his majesty's subjects for the loading or supplying any such ship or ships with a cargo of any sort of goods or merchandise to the East Indies are void. *Per Cur.* Upon the principles of the common law, the consideration of every valid contract must be meritorious. The sale and delivery of goods, the agreement to sell and deliver, is *prima facie* a meritorious consideration to support a contract for the price. But the clear result of the cases is, that if a vendor sell goods with a knowledge of their intended future illegal destination, he cannot recover; the case of *Biggs v. Lawrence*, 3 T. R. 454. is an express authority against the plaintiff's right of action. The ground of that determination was, that the goods were sold for the purpose of being smuggled into England. No distinction can be drawn between that case and the facts disclosed in the defendant's pleas, and which have been found to be true by the jury, for the goods here were sold that they might be smuggled into India, and the agreement was that they should be conveyed to Ostend, and from thence to Calcutta. According to the plea, the plaintiffs did not merely assist another, they must be taken to be principals in the illicit transaction, and that the bond is void.—Rule for entering judgment for plaintiffs discharged. See post, tit. Smuggling; *Holman v. Johnson*, Cowp. 341; *Clugos v. Penaluna*, 4 T. R. 466; *Wagmell v. Read*, 5 T. R. 599; 9 East. 419; 1 M. & S. 598; 5 Taunt. 181.

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(C) MODE OF TAKING ADVANTAGE THEREOF.

Illegality in the consideration of a bond must be pleaded specially, and the effect of the instrument cannot be avoided on the ground of the illegality merely appearing in evidence, or upon the face of the condition; and the defendant, it is said, cannot under such circumstances, demur. 1 Saund. 295.

VI. RELATIVE TO THE ALTERATION OF.*

(A) By RASURE.

SELBY V. GREENE. M. T. 1704. K. B. 6 Mod. Rep. 233.

The obligee made a considerable erasure in the condition of a bond, and after brought an action on the bond; and the defendant having had oyer, and the bond being in court, and the erasure discovered, the defendant pleaded it was not his deed, and notice of trial was given; but when the plaintiff understood the defendant had found out the cheat, and could prove it, he countermanded the notice. It was moved, on affidavits of this matter, that the bond should remain in the custody of the officer of the court till the cause should be tried, for, otherwise, the plaintiff would stay till the defendant's witnesses were dead, and put this forged bond in suit against him, when he could, by no possibility, relieve himself against it; and now, if he would try it by proviso, the plaintiff would be nonsuited, and he might begin again. *Per Cur.* If you had denied the deed according to *Weymark's* case, it is to remain in court till

When in debt on bond the defendant on oyer discovered that a material erasure had been made in the condition, and pleaded non est factum, and the

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* If the bond be altered by the obligee, although but in an immaterial point, he vacates the deed; see 10 Co. 92; 11 Co. 27. a; Bull. N. P. 267 though an alteration by a stranger, in an immaterial point, will not avoid the instrument; but it is said to be otherwise if a stranger alter it in an essential particular, for the witnesses cannot prove it to be the deed of the party where there is any material variation; 11 Co. 27 Bull. N. P. 267, Com. Dig. tit. Fait, l. Roll. 41; Cro. Eliz. 626. As where the date is erased after the delivery; 5 Co. 28.

plaintiff, perceiving the erasure to be detected, countermands no notice of trial, the Court refused to impound the deed.

The sum secured by a bond had been once mentioned, and on a second statement, it is written "one pounds," and the word "hundred" is interlined without the obligor's knowledge held not to vitiate the bond.

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Removing the seal of one obligor in a several bond, does not vitiate the instrument as to the other parties.

the cause is tried, otherwise it shall only remain for the term in which it was brought in; but the most it goes to, is, that on an imparlance granted, it should remain in court till the defendant pleads. If it is by bill, the defendant, after imparlance, may crave oyer; and, therefore, it must remain in court till the party is put to plead, that he may, in that case, have oyer of it. Holt, C. J. recollected Sir Solomon Swale's case, where a deed, on evidence, was found not to be the defendant's deed, and by consequence forged; and it was insisted on, that the Court ought to cancel it; yet the Court denied it, because there might be error in the proceedings, for which the verdict might be set aside, and then the bond would stand unimpeached, and so the matter be brought in question again; and therefore it was resolved it should not be cancelled, but remain in the court uncanceled. And they said, here the defendant's best way would be, to carry the cause down by proviso; and if the plaintiff would suffer himself to be nonsuited, whereby the suit will be at an end, and the plaintiff entitled to take his bond out of court, yet that nonsuit would be strong evidence against him in another action to be brought thereon; or else he might have his witness's testimony perpetuated in Chancery.

(B) BY INTERLINEATION.

WAUGH v. BUSSELL. E. T. 1814. C. P. 1 Marsh. 311; S. C. 5 Taunt. 706.

On oyer craved of a bond, the plaintiffs set out the condition as for payment of the sum of 100*l.*, by equal, &c. payments, until the full sum of *one pounds* should be paid. Plea, the general issue. It was proved, that the person who drew up the bond had, without the knowledge of the defendant, inserted the word *hundred* between the words *one* and *pounds*. The plaintiff had a verdict, and on a motion to set it aside, on the ground that the interlineation absolutely vitiated the bond, the Court were of opinion, that in the absence of the word *hundred*, the context would have shown the tenor of the bond sufficiently to have given it effect. That it was, therefore, not affected by the alteration, in which alone it could operate in avoidance of the bond.—Rule refused.

(C) BY REMOVING THE SEAL.

COLLINS v. PROSSER. E. T. 1823. K. B. 1 B. & C. 682.

Declaration, in debt on a bond made by Wegg to the plaintiffs for 1000*l.*, conditioned for the performance of certain duties by another person. First plea set out the bond—that G. B. Mainwaring, his heirs, executors, &c. were firmly bound to the plaintiffs, justices of the peace for the county of Middlesex, in the sum of 12,000*l.*; that E. Woodhouse, his heirs, &c. were bound to the plaintiffs in 3000*l.*; that P. Presland, S. Jackson, and W. Everett. were bound to the plaintiff in 2000*l.* each; that Sir N. Conant, G. S. Wegg, and J. Weyland, jun. in the sum of 1000*l.* each, "for which, to be well and faithfully made, we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each, and the heirs, executors, and administrators of us, and each of us, firmly by these presents." The condition of the bond was, that the justices of the peace for the county of Middlesex, at their general quarter sessions, having appointed G. B. Mainwaring the treasurer for the county, and requiring a security to the amount of 12,000*l.*, the obligors became bound for the several sums set to their names respectively, and not further; or, otherwise, that G. B. Mainwaring should account for all sums of money which were then, or should thereafter, come into his hands as treasurer, and then the obligation was to be void. The first plea then stated, that the bond was not the deed of Wegg. Second plea, that Sir Conant sealed and delivered the writing obligatory, and that afterwards his seal was torn off, and taken away from it, without the privity or consent of G. S. Wegg, or of the defendants, his executors, whereby it became cancelled and void as to G. S. Wegg and the defendants. Third plea, similar to the last; that the seal of Sir N. Conant was torn off, and taken away from the writing obligatory, with the privity and consent of the plaintiffs, whereby it was cancelled. Replication, that before the seal of Sir N. Conant was torn off, F. Const became surety for G. B. Mainwaring, in his room, and that F. Const. had paid to the

the plaintiffs the sum of 1000*l.*, in which he had become so bound. Demurrer, and joinder in demurrer. It appeared, that there was not any sum written opposite any of the names of the obligors, except that of P. Presland, before which was written 2000*l.*, and that the seal opposite his name, and the seal attached to the name of Sir N. Conant, had been cut off and taken away. In support of the demurrer it was contended, that the taking off the seal of one rendered the bond void as to all the obligors. By the Court. We are of opinion, that the facts disclosed in these pleas are not an answer to this action. It is first said, that the bond is joint and several. But the recital, that each party intended to be answerable only for a particular sum, and that almost all the parties bound themselves in different sums of money, clearly shows, by the words, "for which we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each," that the three obligors meant only to join in the security to the amount of 1000*l.* each. The bond is, in all its terms, a several bond; and the mere circumstance, that it was given for one thing (the discharge of a particular duty), cannot make it a joint one. It is several in its penalties; it must be several as to its parties. It is secondly said, that the removal of the seal of one of the obligors has cancelled the bond as to the whole. There is not any authority for saying, that the act of taking one seal from a several bond will destroy its effects on the other persons; but it is contended, that the right to contribution from that party is thus taken away. It is very doubtful, whether, under any circumstances, there could have been any contribution made on this bond. That remedy is founded on the principle, that one of several persons has paid a sum of money, for which all of them were liable; but such is not the state of the present case; for when the defendants have paid 1000*l.*, they will not have paid any sum for which any other person but the testator was responsible. It has been suggested, that Mr. Mainwaring might have been a defaulter for a sum less than 1000*l.*, and then that it would have been an act of injustice for any one of the obligors to have paid the whole of the sum, without having a claim on his co-obligor, and yet that is certainly the legal consequence of this bond.—Judgment for the plaintiffs. See 5 Co. 19; 1 East. Rep. 497; 3 Taunt. Rep. 87; Cro. Eliz. 120; 2 Bos. & Pull. 270; 5 Co. 103. b; *ibid.* 23; March. Rep. 125; 6 East. Rep. 506; 2 Maule & Selw. 363.

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VII. RELATIVE TO THE DISCHARGE OF OBLIGOR.

(A) BY ACT OF THE PARTIES.

1. **SELLERS v. BICKFORD.** M. T. 1817. C. P. 8 Taunt. 31; S. C. 1 Moore. 460.

This was an action on a bond. The condition recited that in consideration of the assignment by the defendant to the plaintiff of the lease and goodwill of a certain shop and business, the defendant should not carry on, nor procure to be carried on, a certain business on his account, or for his use, within a certain distance from the shop, &c. assigned. Breach, that the defendant had, contrary, &c. carried on the said business within the prescribed distance. Plea, that the defendant did, by the leave and license of the plaintiff, carry on the said business within the prescribed limits. Demurrer and joinder. It was contended for the plaintiff, that this plea was insufficient, as a parol licence, before breach, could not effect a discharge from the condition in the bond. The Court, without hesitation, on the authority of *Thompson v. Brown*, 1 B. Moore. 358; S. C. 7 Taunt. 656; gave judgment for plaintiff. See Com. Dig. Assumpsit, tit. G; 6 Rep. 44; 9 *ibid.* 77; Palmer. 110; Styles. 8; 3 Lev. 234; Cro. Eliz. 697; 2 T. R. 425; 3 *ibid.* 590; 8 East. 344.

A release or a dispensation with its conditions, must be by deed.

2. **PARSONS v. COWARD.** H. T. 1736. K. B. Ca. Temp. Hard. 357.

In this case the defendant pleaded, that after making the bond, &c., the plaintiff's testator, by her last will and testament, sealed with her seal, did release the bond. On demurrer, the plaintiff had judgment. See *Styles. 286*; 1 Sid. 421; Vent. 39; 3 Atk. 520; 1 P. Wms. 86. n. 2; 1 Ves. 49; Toller Executors, 308. 4th edit.

And a testamentary direction will not operate as a release.

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12 generally, marriage of a female does not operate as an extinction of the debt.

3. GAGE v. ACTON. H. T. 1698. K. B. Carth. 511.

Per Cur. All contracts and debts in general, though they are to be performed or paid in future, are extinguished by the intermarriage; but there are some things which the law holds to be only suspended, and of which the operation will revive on the cause of interruption being dissolved. See Co. Lit. 264-5; 8 Rep. 156. a; March. 123; ante, p. 711.

4. MILMOORE v. EWERT. M. T. 1793. K. B. 5 T. R. 381. S. P. ACTON v. GAGE. 1 Lord Raym. 515; S. C. Carth. 511; S. C. Comb. 67; S. C. Holt. 379; S. C. 1 Salk. 325

Est: where a man is in contemplation of marriage, and with a view to provide for his intended wife; gave her a bond conditioned for the payment of money after his death, this, it was holden, was no extinguishment.

To an action of debt on bond executed by M. the late husband of the plaintiff, the defendants, the heirs at law of M. after craving over of the condition of the bond, which was that his representatives should within 12 months after his death pay to his widow a sum of money, pleaded that after the making of the writing obligatory, to wit, on such a day the obligor intermarried with the plaintiff, who then and there became and continued covert of the obligor until his death. Replication, that the bond was made in contemplation of the marriage, and with an intent, that if the marriage should take effect, and the plaintiff survive, she should have the benefit of it. The defendants demurred generally; and in support of the demurrer argued, that by the marriage the bond was extinguished; that the agreement mentioned in the replication was matter in pais and could not be let in against an express deed; that the replication did not even state that there was an express agreement, but only, that the bond was given in contemplation of marriage, and that no issue could be taken upon the contemplation with which the act was done. But the Court were of opinion that the facts disclosed by the replication supported the declaration, and were perfectly consistent with the bond, which it was holden was not extinguished by the marriage. See Hob. 216; 1 Salk. 325; 12 Mod. 290; 2 Vern. 481; 2 P. W. 243.

5. CLAYTON v. KYNASTON. H. T. 1697. K. B. 1 Lord Raym. 420; S. C. Salk. 573. S. P. Admitted in DEAN v. NEWELL. H. T. T. 1799. 8 R. 168.

And a release of one obligor;

Per Cur. Where two are jointly and severally bound, a release to one will operate as a discharge of the other obligor. See Co. Lit. 232. a; Lit. Rep. 191; 1 Keb. 936.

6. BAYLEY v. LLOYD. M. T. 1758. C. P. 7 Mod. 250.

Or by one obligee in a joint and several bond, operates in discharge of, and by [627] all parties bound.

Debt on bond by trustees. Plea, a release from one of the trustees after action brought, Demurrer, on the ground that the situation of the plaintiffs as trustees differed from that of original parties, and joinder.

Per Cur. The obligees have the legal interest in them, and consequently the only right to release; and a release by one, being a release from the other, it is certainly well pleaded.* See 1 Leon. 272; 2 ib. 214; 3 ib. 275; Leon 263; 2 Rol. Abr. 409; Moor. 832; Cro. Eliz. 6; Co. Litt. 232. a.

7. CRAIG v. D'ETH. T. T. 1789. MS. 7 T. R. 670. n.

But where a release has been obtained fraudulently, the fraud may be replied.

To a plea of a release, after action brought for the arrears of an annuity bond due, the replication stated that the bond was assigned by the plaintiff to A. with a covenant on his part not to release without the concurrence of A., and the defendant had notice of these assignments, and that the defendant had obtained the release from the nominal plaintiffs in fraud of A. The case was decided on a point of evidence, but no objection was taken to the mode of pleading. See post. p. 630.

8. LEGH v. LEGH. T. T. 1799. C. P. 1 B. & P. 447.

Or the Court will summarily set aside the defendant's plea.

It appeared in this case that the defendant had given a bond to the plaintiff for securing a debt: the latter had assigned it to A., and given notice to the defendant of such assignment. A. brought the present action, formerly in the name of the obligee; the obligee on receiving satisfaction on the bond, gave a release to the defendant, who pleaded it in bar. On a rule nisi to set aside the plea, the Court were unanimously of opinion that as the defendant had, by paying the nominal plaintiff, committed a fraud on the party really interested

*Sed vide 3 Esp. 102. when the Court held that an admission by one trustee will not be obligatory on his co-trustees,

the assignee of the bond, the Court might consistently with the rules adopted by them in cases of fraud, deprive the defendant of her right to plead the release. The Court advised a reference to the prothonotary to ascertain the sum due to the plaintiff on the bond. See this case more fully abridged, post, 630.

9. *DEAN v. NEWHALL*. H. T. 1799. K. B. 8 T. R. 168. S. P. *FITZGERALD v. TRANT*. 11 Mod. 254. S. P. *HUTTON v. EYRE*, 6 Taunt. 289.

To debt on bond given to the defendant and one A. B. the defendant pleaded that while the bond remained in force, and previous to the commencement of this action, the plaintiff by a certain indenture made between the said A. B., the plaintiff and certain other parties, the plaintiff had released the said A. B. from his obligation on the said bond, and of the debt &c. Replication denying the plea generally, and issue thereon. It was proved that the defendant entered into the bond in question as security for A. B. who on becoming insolvent, assigned over his effects to his creditors in trust. The plaintiff executed the deed as a creditor, and received a dividend thereunder. This deed contained on the part of the creditors, that "they would not sue, arrest, implead, or prosecute A. B. his executors or administrators, &c." and it was thereby provided that "in case any of the said creditors should sue, &c. those presents should be a sufficient bar, &c." Lord Kenyon, C. J. was of opinion that the plaintiff had justice on his side, and observed that the cases of *Fitzgerald v. Frank*, and *Lacy v. Kynaston*, Holt 178; 1 Lord Raym. 690; [628] and 12 Mod. 551; were sufficient to confirm his opinion, that as a covenant not to sue was only a personal release, it could not relate to any but the particular individual expressly discharged by the covenant. See tit. Action, div. "Circuity of;" and the cases there cited, ante, vol. i. p. 199. et seq.

10. *LACY v. KYNASTON*. T. T. 1700. K. B. 1 Lord Raym. 690; S. C. 2 Salk. 575; S. C. Holt. 178; S. C. 12 Mod. 415.

Per Cur. If A. be bound to B. in a bond, &c. B. covenants never to sue A. on the bond, this will be a bar to an action on the bond, because B. has excluded himself from all the remedy that he might have on the bond. But if A. and B. be jointly and severally bound to C., and C. covenants never to sue A., this is no defeasance, because he has a remedy against B.

11. *AYLIFF v. SCRIMSHIRE*. T. T. 1688. K. B. 2 Salk. 573; S. C. 1 Show. 46.

To debt on bond, the defendant pleaded a covenant since made by the plaintiff, whereby he covenanted not to sue for the said debt on the said bond, for and during the term of 99 years. Holden bad on demurrer; for it is but a mere covenant, and does not enure as a release or defeasance. and so cannot be pleaded in bar. See Cro. Eliz. 352. 623; 1 Rol. 939; 12 Viz. 461.

(B) BY OPERATION OF LAW.

1. *CHEETHAM v. WARD*. H. T. 1797. C. P. 1 B. & P. 630. S. P. *DORCHESTER v. WEBB*. W. Jones. 345.

To an action on a bond by the executors of one A. B., the defendant pleaded that C. D., one of the plaintiff's and executor of the said A. B., was a joint and several obligor with him, the said defendant, in the said bond; and that A. B. by his last will appointed the said C. D. to be one of his executors.

* But where a covenant not to sue an obligor within a specified time concluded, "and if he do, that the obligor shall plead this as an acquittance," it was construed to be a release, although the suspension of the obligee's right of action was only temporary; Roll. Abr. 939, pl. 2.

† But in equity, a testator cannot, by constituting the obligor his executor, affect the rights of creditors; therefore, where the deceased has not left a fund sufficient for the payment of his own debts, the debt due on the bond shall be assets, and distributable among the creditors. But as against legatees, the appointment operates as a discharge, unless the presumption arising from the appointment be contradicted by the express terms of the will, or by strong inference from its contents. As, where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor, such debt shall be assets to pay not merely that specific legacy, but all other legacies; 4 Bac. Ab. 11; or if he leave the executor a legacy, it is deemed a sufficient indication that he did not mean to release the debt; see post tit. Executors and Administrator.

A covenant not to sue is only a personal release;

And operates as such by construction to avoid circuity of action.

Therefore a covenant not to sue one of two or more obligors, is not a release of the others.

A covenant not to sue must be perpetual to operate as a release.

The appointment of an obligor, or one of several obligors in a bond, as executor of the obligee, discharges the debt.

[629] of his said last will, and died without having revoked the same; and that the said C. D. duly proved &c. whereby he the said defendant was, together with the said C. D. absolutely released from his obligation. General demurrer, and joinder. In the course of the argument, a case was cited from the year book, 21 Ed. 4. 81 b. S. C. Bro. Abr. tit. Executors, pl. 118. in which it appeared that it was decided by Brian, C. J. in answer to a question by the prothonotary, that if an obligee in a joint and several bond make one of them his executor, and die, such appointment operates in discharge of all the obligors. The Court thought that authority decisive of the present case, and gave judgment for the defendant. See Cro. Car. 373; 1 Salk. 303; 11 Vin. Abr. 398; 8 Co. 136.

And the bare appointment is in itself a discharge whether or not the obligor accepts such executorship.

2. WANKFORD V. WANKFORD. M. T. 1698. C. P. 1 Salk. 298.

A. B. being obligee in a bond given by C. D., the plaintiff's testator, binding his heirs, &c. appointed C. D. his sole executor. C. D. did not prove the will, but, dying, appointed the plaintiff his executrix, who proved the will of C. D., and took administration with the will annexed of A. B. and brought this action against the defendant, as heir of C. D.—The defendant had judgment. See 20 Ed. 4. 17; 21 ibid. 3 b; Plowd. 184. b; 1 Vent. 303. Co. Lit. 264. b. n. 1; Bro. Abr. Executor, 114; W. Jones. 345; 2 Lev. 73; 21 Hen. 7. 30; Cro. Car. 373; Cro. Eliz. 150; Dy. 140.

3. RAWLINSON V. SHAW. H. T. 1790. K. B. 3 T. R. 557.

But where an obligor makes an obligee his executor, acceptance of the office by the obligee.

To an action of *assumpsit* on promises by the testator, the defendant pleaded that the testator appointed the plaintiff and the defendant executors of his last will and testament, and died without revoking or altering the same. Replication, that the plaintiff had not proved the will, nor taken on him the burthen, the said appointment, nor administered to the goods, &c. of the deceased. On demurrer to the replication, it was urged for the defendant, that the argument to be drawn from the appointment of the plaintiff as executor, on the ground that it operated as a suspension of his right of action, was nugatory, as the plaintiff had not formally renounced his right to act under such appointment. But the Court said, that independently of the rule, that when a defendant pleads that another person is executor with him, an averment that the other has administered is essential. Great injustice would be done if a debtor had the power of acquitting himself of his debt, by merely appointing his creditor his executor, and the creditor had not the power of refusing the office.—Judgment for plaintiff.

4. COCK V. CROSS. M. T. 1672. K. B. 2 Lev. 72.

Or satisfaction out of the testator's goods, are essential to a discharge of the obligation.

A. and B. were bound jointly and severally to C., and A. made D. his executor, and died. D. made C., the plaintiff and obligee, his executor, and died. C., the obligee, brought debt on this obligation against B, who pleaded that A. made D. his executor, who made the plaintiff his executor; and that the plaintiff had administered the goods of A., not saying to the value of the debt, nor of what value; hereupon the plaintiff demurred, and had judgment, for the bond being joint and several, though one of the obligors be discharged in this manner, yet the obligee may still sue the other, if he hath not received a full satisfaction by the administration. See Hob. 10.

The courts of law will recognise the assignment of a bond so far, that if the original obligee release the debt after notice to the obligor

VIII. RELATIVE TO THE RIGHT OF THE OBLIGEE TO ASSIGN, AND OF THE EFFECT OF SUCH TRANSFER.*

1. LEGH V. LEGH. T. T. 1799. C. P. 1 B. & P. 447.

On showing cause against a rule for leave to set aside a plea of release to an action on a bond, it appeared that the bond had been assigned to J. L. as a

* In a note to a prior part of his work, ante, p. 254. the doctrine restraining the assignment of choses in action, has been made the subject of cursory observation: and as it is intended more fully to examine the origin, nature and extent of the technical rules connected with it, under the rule of Choses in Action, the present note will be confined to a summary statement of the law concerning the assignment of bonds. Securities of this description cannot be in general assigned at common law, so as to entitle the assignee to an action in his own name, and the statutory exceptions are confined to bail, replevin, and bastardy bonds; and to cases of bankruptcy or insolvency. The only strict common law right pos-

security for money advanced to the original obligee, and of which assignment of the as the defendant had had due notice; after such notice the obligee released the assignment, the bond, and an action having been brought in the name of the obligee by J. L., the defendant pleaded the release in bar. *Per Cur.* The conduct of this defendant has been against good faith; and the only question is, whether the defendant must not seek relief in a court of equity. The defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor, and take a release from him, there are many instances in which the Court has set aside a release given to prejudice a real plaintiff. All these cases depend For the mere assign ment of the instrument amounts to a covenant, that the assignee shall receive the amount secured.

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on circumstances. See 1 Camp. 392; 4 B. & A. 419; 9 East. 470; 7 T. R. 670. a; Doug. 407; 7 Taunt. 48; 4 Moore. 192; 1 Chit. Rep. 390. 391. n; 1 Salk. 160; post, tit. Release, Choses in Action.

2. BETWEEN THE PARISHES OF CATOR AND AICLES. H. T. 1700. K. B. 1 Ld. Raym. 683; S. C. 1 Salk. 68.

Per Holt, C. J. A bond, though it be not assignable in point of interest, yet is a covenant that the assignee shall receive the money to his own use.

3. FENNER v. MEARES. H. T. 1777. C. P. 2 Bl. Rep. 1269.

Assumpsit for money had and received to plaintiff's use. On *non-assumpsit* pleaded, it appeared that defendant was captain of an East Indiaman, and had borrowed of J. C. 1000*l.* *respondentia* bonds of 500*l.* each, and in the presence of J. C. signed thereon the following indorsement—

"I, the underwritten, do hereby declare that the within bond, granted by me to the within named J. C. is not subject to any article or articles of agreement, or to any set-off whatsoever, but that if in case the said J. C. shall choose to assign it to any person or persons, I do hereby acknowledge that I hold myself bound to pay unto such assignee or assignees thereof as shall be duly appointed by him the said J. C. the whole, both the principal and the interest of the within bond, agreeable to the tenor thereof, without any deduction or abatement whatsoever."

The plaintiff had advanced money to J. C. upon an assignment of these bonds, with a covenant from J. C. that he had a good title to assign, and would be satisfied by the assignee of an obligation is, that of being enabled, by virtue of the assignment, to retain the parchment, or paper, upon which the bond is written, and to cancel and use the same at his pleasure; Co. Lit. 232. a; 1 Rep. 1. But courts of law have, in some instances, though in a qualified manner, recognised the equitable interest, of the assignee of a bond. In *Kingdom v. Jones*, 2 Skin. 6; T. Jones 150. it was said, that if an assignee have an equity, that equity should be no exile to the courts of common law; and in *Winch v. Keely*, abridged ante, vol. iii. p. 923. we may remember it was decided, that when the obligee has assigned over a bond, and afterwards become bankrupt, the action should nevertheless be brought in his name; see also ante, vol. iii. p. 704. And the rule that the suit upon a bond must be brought in the name of the original obligee, is so inflexible, (see 1 East 104; 4 T. R. 340; 1 T. R. 621; 1 H. Bl. 239; 8 T. R. 574:) that it is usual in all assignments, to insert a power, authorising the assignee to sue and recover the money, in the assignor's name. In equity, however, the rights of the assignee are of a more extensive nature, and are there distinctly recognised; for if the obligor, after notice of the assignment, pays the money secured by the bond to the obligee, he will be decreed to pay it over again; Amb. 17; 2 Vern. 595. 1 Ves. 411; 2 Vern. 428; id. 540; id. 595; 3 P. Wms. 199; and to create such an equitable interest, the assignment may be made by parol as well as by deed; 4 T. R. 690. 4 Taunt. 326. In the absence, however, of notice payment to the obligee would be a discharge of the claim of the assignees; 1 Ch. C. 232.

A bond once assigned, cannot, in general, be afterwards assigned; 3 P. Wms. 307; 2 P. Wms. 496; but if the purchaser gives no notice to the trustee, of his purchase, and such equitable right is afterwards assigned to a second purchaser, who gives notice of his assignment, he, it has been thought, would be preferred; see Sugd. Vendor, and Purchaser, 600. 4th edit.

An assignee must take the security assigned, subject to the same equity that it was encumbered with, in the hands of the obligee, as if, on a marriage treaty the intended husband enters into a marriage brokerage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor; 2 Vern. 428. 692. 765. But time and circumstances, it has been said, may strengthen the case of an assignee; 1 Ves. 122.

be a surety for the payment of the money that should be due thereon. The plaintiff, on the return of the vessel from India, sent a message to the defendant, acquainting him with the assignment, and requested payment of the money; the defendant desired time, and begged that the plaintiff would not sue him. It was objected at the trial that this action was not sustainable, it being a debt on a specialty. But De Grey, C. J. thought otherwise, and there was a verdict for the plaintiff for principal and *respondentia* interest; a new trial was afterwards moved for; but by the Court, *Respondentia* bonds have been found necessary for carrying on the Indian trade, but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment, the money which I have so borrowed shall no longer be the money of A. but of B. his substitute; the plaintiff is certainly entitled to the money in conscience, and therefore entitled also at law; for the defendant has promised to pay any person that shall be entitled to the money. And Blackstone, J. said, The promise made by the defendant, upon his return from India, was clearly an *assumpsit* to the plaintiff; it would be a sufficient promise to avoid the statute of limitations; and that the assignment and other transactions were fully sufficient as a consideration to make that *assumpsit* binding; and upon that ground it was clear that a general *indebitatus assumpsit* would lie. See 1 Rol. Ab. 29; Sid. 212; 1 Salk. 29. 4 T. R. 343; 8 id. 571; 1 H. Bl. 239; 2 Marsh. 501; post. tit. Set-off.

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The assignee of a Scotch bond may maintain an action of *assumpsit* there against the obligor in his own name.

So if a bond be given by C. to A. in trust for B., in an action on the bond by A., C. may set off a debt due from B. though the fact of the trust does not appear on the face of the instrument.

But the assignee of a bond of which he was not the *cestui que* [633] trust, cannot set off the amount when sued.

4. INNES v. DUNLOP. T. T. 1800. K. B. 8 T. R. 595.

Action of *assumpsit*; the declaration stated that the defendant, together with J. B. made their joint and several bond in Scotland to H. and Co. payable on, &c. that H. and Co. according to the laws of Scotland, assigned the same to J. H. who assigned it to J. R. who assigned to the plaintiff, of which the defendant had notice; that by reason of the premises, and according to the law of Scotland, the defendant, became indebted to the plaintiff, &c. and being so indebted, he, in consideration thereof, promised to pay, &c. On demurrer it was objected that the plaintiff, who was merely an assignee of a chose in action, could not sue in his own name, but should have brought the action in the name of H. and Co. *Sed per Cur.* This is not an action upon the bond, and the assignment is clearly a sufficient consideration for the *assumpsit* of the defendant, in the same manner as actions of *assumpsit* are maintained in every day practice upon foreign judgment.—Judgment for plaintiff. See 6 East. 101.

5. BOTTOMLEY v. BROOKE. M. T. 1780. C. P. Cited in WINCH v. KEELY. 1 T. R. 621. S. P. RUDGE v. BIRCH. M. T. 1783. K. B. Cited id. recognised in WEBSTER v. SCALES. Cited also id. said in 17 East. 153. to have been overruled in LANE v. CHANDLER, in the Exchequer.

Action of debt on bond; the defendant pleaded that the bond was given for securing 100l. lent to the defendant by one E. C. and was given by her direction to the plaintiff, in trust for her, and that E. C. before the action brought, was indebted to the defendant in more money than the amount of the bond; to this there was a demurrer, which was withdrawn by the advice of the Court; hence it may be inferred that the Court did not look to the person legally entitled, but to her who was beneficially interested in the bond.

6. WAKE v. TINKLER. T. T. 1812. K. B. 16 East. 36.

Action by indorsee against defendant as maker of a note, with the general counts; plea, that before the making of the promises, to wit, on, &c. the plaintiff executed a bond to W. A. in the penal sum of 260l. conditioned for the payment of 130l. on a day long since past, and that the bond being unsatisfied, W. A. before the commencement of the suit, assigned it to the defendant, and at that time there was due and owing from the plaintiff, by virtue of the bond so assigned to the defendant, more money than was due or owing from him to the plaintiff, upon the note, to wit, 200l. which the defendant offered to set off. On demurrer, the preceding cases were cited in support of the plea. But the Court stopped the counsel, and said, that if he could show that this case rang-

ed itself within the decisions of *Bottomley v. Brook*, and *Rudge v. Birch*, they would bear him further, but that they were much more inclined to restrain than to extend the doctrine of those cases. At any rate, they said, the present case goes further than either of them, for here the bond debt was assigned to the defendant, who now pleads it as a set-off; and it was *not originally* taken by the obligee in trust for the defendant. See the observations by Lord Ellenborough in *Scholey v. Mearns*, 7 East. 153.

IX. RELATIVE TO THE OBLIGEE'S REMEDY AGAINST THE OBLIGOR, OR HIS PERSONAL REPRESENTATIVES.

(A) FORM OF ACTION.

Debt is the proper form of action by which the payment of a bond can be enforced; see *Comb*, 447; *Com. Dig.* tit. Debt, a. 4.

(B) PARTIES TO THE ACTION.*

MOLLER v. LAMBERT. M. T. 1810. N. P. 2 Camp. 548.

The defendant in this case had bound himself to certain persons, trading under the firm of "The Widow Moller and Son." The widow died before the execution of the bond; and the son, who still traded under the same style, brought this action. It was urged, for the defendant, that the plaintiff's names should have been specified. *Sed per Cur.* It is sufficient to prove that the plaintiffs are the persons intended by the name of "The Widow Moller and Son."—Verdict for plaintiff.

A bond given to a firm may be sued on by those parties who were in the firm when the bond

(C) ARRESTING OBLIGOR. See tit. Covenant.

In debt on bond conditioned for the payment of money, the plaintiff is entitled to the security of bail, for the principal and interest due upon it; but this right is confined to the sum actually and really due by the condition, as the penalty, though strictly speaking, the legal debt, is now considered merely to be a security for the due payment of the principal, interest, and costs; see 6 T. R. 13; 6 T. R. 271; 2 East. 409; this equitable rule owes its origin to the statute of 4 Anne. c. 16. s. 13; see 10 Mod. 24; which enables the defendant to discharge and satisfy the bond by bringing into court the principal and interest then due. Where a bond is conditioned for the payment of an annuity, or money by instalments, the exercise of the right to hold to bail should be limited to the arrears actually due; but it is conceived that where the bond, though conditioned for the payment of money by instalments, it is expressly agreed that if default be made in any one payment, the bond is to be put in force for the whole principal and interest then remaining due, that in such case the right to the security of bail need not be confined to the particular instalment over due, but may be maintained for the whole principal and interest; see 2 Taunt. 387; 1 B. & A. 214.

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was given showing that they were the parties really intended

(D) AFFIDAVIT OF DEBT.

See tit. Affidavit to hold to Bail, *ante*, vol. i. p. 410.

(E) DECLARATION.

(a) As to the title of the Court. See post, tit. Declaration.

(b) As to the term. See tit. Declaration.

* *By whom to be brought.* The action upon a bond must be instituted in the name of the party in whom the legal interest is vested, viz. the obligee or party to whom the obligor has bound himself; thus if a bond be made to A. to pay him or a third person a sum of money for the benefit of the latter, the action must be in the name of A. and the third person cannot sue or be joined. When the obligation is to pay several, they must all, if living, join in the action, even if the instrument, we have seen, were in terms joint and several. If one or more of several obligees, who ought, when living, to join, be dead, or did not seal the instrument, that fact should be averred in the declaration, at the suit of the others, or the defendant may craveoyer and demurrer; but if the plaintiff be prepared to prove the death of the party whose name is not inserted, the omission of the death in the declaration, would be no ground of nonsuit; 5 Esp. 32; and if it appear upon the face of the pleading, that there are other obligees who ought to be, but are not joined in the action, it is fatal on demurrer, or on a motion in arrest of judgment, or on a writ of error; and though the objection may not appear on the face of the pleading, the defendant may avail himself of it, either by plea in abatement, or as a ground of nonsuit on a trial. When the bond has been assigned, we have seen, *ante*, p. 630. n. the action must be brought in

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Where a bond is dated at a place a broad, it should be stated to have been made there with a viz. at, &c. (the venue in the action.) A declaration in debt on bond, stating that on such a day the defendant be came in

(c) *As to the venue.**
ROBERT V. HARNAGE. M. T. 1704. K. B. 6 Mod. 228 ; S. C. 2 Salk. 659 ; S. C. 2 Lord Raym. 1043.

The plaintiff declared on a bond made at London, in the parish, &c. on, &c. On oyer, the bond appeared to be dated at Fort St. David's, in the East Indies. On objection taken on the ground of variance, the Court said that a bond acquired a locality by a date of that kind, and should have been stated to have been made at the place in the East Indies, viz. at London, or wherever the action might be laid.

(d) *As to the date.*

WOODCOCK V. MORGAN. M. T. 1704. K. B. 6 Mod. Rep. 306.

Debt upon bond, showing that on such a day, the defendant became indebted to the plaintiff, *per scriptum suum obligatorium*, without showing the date of the bond, or saying that it was sealed. *Per Cur.* Becoming indebted *per scriptum obligatorium* is enough. But the plaintiff being, "Woodcock complains of Morgan, &c. of a "plea that he render to him 60*l.* of lawful money, &c." it was held ill. debted to the plaintiff, *per scriptum suum obligatorium*, is sufficient without showing the date of the bond, or saying that it was sealed and delivered.

(e) *Describing the nature of the debt.*

BASS V. FIRMAN. M. T. 1701. K. B. 1 Lord Raym. 697.

Describing the bond as payable in English in stead of West Jer sey money, is a fatal variance.

Debt on bond. *Noverint universi per presentem me, Firman de Perth Amb. in provincia de West Jersey, teneri et firmiter obligari* to the plaintiff 80*l.* *legalis monetae predictae*, &c. the plaintiff demanded 80*l.* of the money of England. Upon *non est factum* pleaded, Holt, C. J. nonsuited the plaintiff, holding that this bond bound the defendant in the money of West Jersey, not of England, the condition of the bond being also for the payment of 40*l.* of money of the same province. See ante, p. 516.

(f) *As to describing the parties, and their execution of the bond.*

When the residence, &c. of the parties is stated in correctly in the declaration, a variance is fatal.†

1. **ARNOLD V. MEREDITH.** M. T. 1719. K. B. 11 Mod. Rep. 282 ; S. C. 21 Vin. 540.

In an action of debt on bond, the plaintiff declared against "John Meredith late of the parish of St. Ann's, in the city of *Westminster*, in the county of Middlesex, otherwise called John Meredith, of the parish of St. Ann." On oyer of the bond and setting it forth, it was "J. M. of the parish of St. Ann's, in the county of Middlesex." Pratt, C. J. If the declaration and bond do not agree, it may be helped by the *alias dictus*, which is in the nature of an averment; but here the *alias dictus* does not agree with the bond, and therefore will not aid the other defect, which cannot be intended or supplied.

2. **GOULD V. BARNES.** E. T. 1818. C. P. 3 Taunt. 503. S. P. **LINCH V. HOOKER.** M. T. 1704. K. B. 6 Mod. 225 ; S. C. 1 Salk. 7.

If a man binds him self in a wrong christian name, he must be sued by that name.

The defendant entered into a bond by the name of *Thomas Barnes*. The name of the original obligee, Where one or more of several obligees die, the survivor, and not the executors or administrators of the deceased, must sue, nor can the latter be joined in the action. But where there is only one obligee, and he die, the action must be by the executor or administrator.

Against whom to be brought. The action must in general be brought against the obligor or his executors or administrators, or if the heir be named, and he have assets by descent against the heir, or if there be several, and the obligation only joint against them all, or if joint and several against them all jointly, or each separately, and if one of the obligors in a joint bond die, the survivor alone must be sued, he may either plead the survivorship in bar. or give it in evidence under the general issue; but if it were several, or joint and several, the executor of the deceased may be sued in a separate action, but he cannot be made a defendant jointly without the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*.

* The venue is transitory, as if debt be brought upon a bond made at *Hamburgh*, it may be alleged at *H.*, that is to say, at *Westminster*, in the county of *Middlesex*; Latch 4; Salk 660; 2 Cro. Jac. 76. But if the defendant plead that *H.* named in the bond is beyond the seas, and no such vill in England, it will be bad; see 2 Cro. Jac. 76. But it has been holden, that dating a bond at a certain place makes it local; see 11 Mod. 52. This decision, it is presumed, cannot be deemed law.

† The insertion of such particulars in the declaration is useless and untechnical.

plaintiff declared against *Joseph Barnes*, the defendant's real name, and stated that he, by the name, &c. of *Thomas Barnes*, of, &c. by his, &c. acknowledged, &c. On issue being taken on the plea of *non est factum*, the plaintiff's counsel contended that the plaintiff should be nonsuited, but the judge suffered the plaintiff to take a verdict; and a rule to enter a nonsuit was subsequently made absolute on the authority of *Clarke v. Istend*, *Lutw.* 891. See *Dyer*. 279. b.; *Cro. Eliz.* 897; 1 *Salk.* 310; 2 *Str.* 1218; 1 *Roll. Abr.* 869. l. 50; *Bac. Abr.* tit. *Misnomer*, A. 1.

3. *VILLARS v. CARY*. M. T. 1701. K. B. 6 Mod. Rep. 303.

In debt on bond, the declaration stated that the defendant entered into the bond *per nomen J. V. Vicecometis Peerbeck, et Domini Buckinghamæ*. It was insisted for the defendant, that the description of the defendant was insufficient, inasmuch as the title could not be considered as a name; and if the surname were so expressed, it should have been stated under an *alias dictus*. The Court concurred in the necessity of that form of statement, but refused to allow the defendant to avail himself of this error, as he had not cravedoyer of the instrument. See 2 *Salk.* 451.

4. *MIDDLETON v. SANDFORD*. T. T. 1814. N. P. 4 Campb. 34.

A bond was declared on as executed jointly by the defendant and others. The bond appeared to be several as well as joint. On an objection being raised that the bond varied from the description in the declaration, *Dampier, J.* said that it was contrary to the practice of pleaders to alledge in the declaration against one obligor in a joint and several bond, that such bond was several as well as joint, and held it no variance.

5. *VERNON v. JEFFREYS*. M. T. 1742. K. B. 2 Str. 1146.

In covenant on articles of partnership, it is said that the defendant demandedoyer: when it appeared that two parties were named in the deed, which concluded in the usual form, *in witness, &c. have set their hands and seals*. On demurrer, it was insisted that theoyer varied materially from the declaration; in which the Court concurred, and observed that the plaintiffs might have averred that the other parties did not seal.—Judgment for defendant. See 2 *Leon.* 47; *Lutw.* 680; *ibid.* 1544; 5 *Co.* 18; *Allen*, 41; *Carth.* 301; 1 *Ven.* 34; 2 *Lev.* 74; 2 *Roll. Abr.* 22.

(g) *As to stating the conditions, and assigning breaches.**

1. *WAUGH v. BUSSEL*. E. T. 1814. C. P. 1 Marsh. 214; S. C. 5 Taunt. 706.

The defendant having cravedoyer of the bond, set out the condition as follows—"for payment of the sum of *one hundred pounds*," by instalments "until the full sum of one hundred pounds be paid," and pleaded the general issue. It was proved on the trial, that the words of the latter part of the condition were, when the bond was executed, "sum of one pounds," and that the word *hundred* was inserted afterwards by the person who drew it up, but without the defendant's knowledge. The defendant's counsel objected that this

* It is now settled, that in debt on bond, with a condition for the performance of any thing, (except the payment of a sum certain, at a day certain, as a post obit bond; 2 B. & C. 84; or the appearance of a defendant in a bail bond; 2 B. & P. 446; or a petitioning creditor's; 3 East, 22;) the plaintiff is bound to suggest breaches in pursuance of the stat. 8 & 9 W. 3 c. 11. s. 8. which statute has been decided to extend to an annuity bond; 8 T. R. 126; an arbitration bond; 6 East 613; and to a bond conditioned for the payment of money by instalments; 6 East 550. Many of the decisions on this statute, are collected in *Tidd's Prac.* 8th edit. 682, 740; 2 B. & C. 82; 3 M. & S. 156, 2 J. B. Moore 220; 1 Saund. 58 n. 1; 2 Saund. 187. n. 2. It appears from the two last references, that it is in general advisable, in declarations on bonds within the statute, to set forth the condition of the bond, and the breaches thereof, instead of deferring it to the replication. And from *De la Rue v. Stewart*, 1 N. R. 362. it should seem absolutely necessary in some cases to state the breach in the declaration, and that it cannot be stated in the replication; but according to the case of *Ethersey v. Jackson*, 8 T. R. 255; 2 Chit. Rep. 278; and *Mr. Sergeant Williams* note, 2 Saund. 187. a; the breach may be assigned in the replication; and it is now considered better not to assign the breaches in the declaration, but to reserve them for the replication, because the defendant in rejoining can only present one answer to each breach, whereas in pleading to the declaration he may answer each breach by any number of pleas; see 5 M. & S. 60; where breaches were suggested in making up the issue; also 5 J. B. Moore. 198.

And where an obligor was bound by the name of John Villars, Viscount Purbeck, and Earl of Buckingham, it was holden that the title should have been stated under an *alias dictus*.

But if a declaration a gainst one obligor in a joint and several bond, alleges execution by the defendant and others jointly, and it appears that the bond was joint and several, it is no variance.

Though if one of the [637] parties does not seal, there should be no averment to that effect. Where the condition of a bond appeared onoyer to be "for the payment of one hundred pounds by instalments till the said sum of one hundred pounds be paid," and on the trial the word hundred in the latter part of the condition was

proved to have been subsequent y interlined without the defendant's knowledge, the Court held that a variance between the oyer and the condition.

proof created a variance between the oyer and the real condition of the bond. The plaintiff was nonsuited, whereon a rule nisi to set it aside was obtained. It was urged for the plaintiff, that it was evident that the word *hundred* was intended to have been inserted, (as without it the idea conveyed was void of sense.) the interlineation had not altered the effect of the bond. But the Court distinguished between the cases of variance in setting out a deed in a declaration and of variance on oyer, and observed, that it was sufficient, in the former instance, to set out the legal effect; but that when, as on oyer, the bond itself is called for, the absolute words must be adhered to. They therefore held, that the condition varied from the proof.—Rule discharged.

2. ROBERT V. HARNAGE. M. T. 1704. K. B. 2 Ld. Raym. 1043; S. C. 6 Mod. 228. S. C. 1 Salk. 659.

The condition of a bond was set out in a declaration to be, to pay to the plaintiff. On oyer the *solvendum* appeared to be to the lawful attorney of the plaintiff or his assigns. It was objected, that this created a variance; but the Court held that as payment to a person legally appointed by the plaintiff, would be payment to the plaintiff himself, the variance was immaterial.

(F) PLEAS AND EVIDENCE.

(a) General issue.

[638]
Where a declaration on a bond stated the obligation to be to the plaintiff and it appeared on oyer to be conditioned to pay to the lawful attorney of the plaintiff, or his assigns, held to be no variance.

The plea of *non est factum*, or general issue, puts in issue the execution of the bond upon which the action is brought; and the plaintiff, in support of his case, will have to prove, by the testimony of a subscribing witness (if any,) the execution of the instrument by the defendant, and the sealing and delivery. It will not be sufficient for the witness to prove that a person of the same name as defendant executed the deed; since proof will be necessary to show, that the person who executed the deed bears not merely the defendant's name, but is the defendant himself; See Bull. N. P. 171; Phill. on Ev. vol. i. 143.

Since the plea of *non est factum*, and evidence thereon, is applicable to other deeds as well as bonds, it will suffice to refer to the former head, under which all the cases relative thereto will be abridged.

(b) Accord and satisfaction. See cases collected *ante*, vol. i. p. 129. 130.

1. BLYTH V. HILL. M. T. 1676. C. P. 1 Mod. Rep. 221-5; S. C. 2 id. 136; S. C. 2 Dany. 115. S. P. BABER V. PALMER. T. T. 1701. K. B. 12 Mod. 539.

To debt on bond, plea that another bond was given in satisfaction is unavailable.

Debt upon an obligation for the payment of money at a day certain. The defendant pleaded, that the plaintiff being desirous to have the money paid before the day, took another bond for the same sum, payable sooner, and this was in full satisfaction of the former bond. Upon this plea the plaintiff took issue, and it was found against him. A motion was made, that notwithstanding this verdict, judgment ought to be given for the plaintiff, for that the defendant, by his plea, had confessed the action; and to say that another bond was given in satisfaction, was nothing to the purpose; Hob. 68; so that, upon the whole, it appears that the plaintiff has the right, and he ought to have judgment; Gro. Jac. 139; 8 Co. 93. a. The Court granted a rule to show cause.

2. WILLIAM V. FARROW. M. T. 1703. K. B. 6 Mod. Rep. 82.

So pleading a feoffment in satisfaction is of no avail, unless the acceptance be laid in the county where the feoffment was made.

In debt on bond brought in London, a feoffment of land in a different county, and an acceptance of the same in the above vill in satisfaction of the bond, was pleaded in bar. On special demurrer, because the acceptance was not laid in London. *Per Cur.* The acceptance must be laid where the feoffment was made, it being local; but had it been a transitory matter, the defendant's plea should not have made it foreign, and such plea, when local, ought not to be accepted without an affidavit of the truth thereof; accordingly the plaintiff was permitted to discontinue, on payment of costs.

3. ROW V. NEEDHAM. M. T. 1698. K. B. 12 Mod. Rep. 243.

Per Cur. Judgment is a good plea in satisfaction of a bond.

(c) Duress. See tit. Duress. (d) No demand.

CARTER V. RING. M. T. 1813. N. P. 3 Camp. 459.

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But judgment is a good plea in satisfaction

To a bond conditioned to be void on payment of a certain sum of money on demand, the defendant pleaded that no demand, either of the principal sum mentioned in the condition, or of any interest thereon, had been made by the plaintiff; it was urged for the plaintiff, that commencing proceedings was a sufficient demand. Lord Ellenborough held, that according to the tenor of the condition, the bond was not forfeited till demand and refusal thereon, and that on till then no action could be brought. See *Cro. Eliz.* 548; 10 *Mod.* 48; 1 *Lev.* 48; 1 *Saund.* 33; 1 *Salk.* 227; 1 *Mod.* 89; *Bul. N. P.* 151; 5 *T. R.* 409; 13 *East.* 352; 14 *id.* 500; 1 *Taunt.* 572; 2 *id.* 323.

(e) *Infancy.*

As an infant cannot be an obligor in a bond, it may be avoided by a plea of infancy; *Cro. Eliz.* 920; *S. C. Moor.* 679; but such a defence cannot be given in evidence under the general issue *non est factum*; 5 *Co. Rep.* 119. a.

(f) *Tender.* See *div. Payment solvit post diem*; and *post, tit. Tender.*

(g) *Payment.* 1. *Solvit ad diem.*

1. *TRYON v. CARTER.* T. T. 1783. K. B. 7 *Mod.* 231. *S. P. MARLE v. FLAKE.* T. T. 1700. K. B. 3 *Salk.* 118.

Per Lord Hardwicke, C. J. Payment before the day may be given in evidence on *solvit ad diem*, because the money is looked upon as a deposit in the hands of the obligee until the day arrives, and then it is actual payment.

2. *MERRIL v. JOSSELYN.* H. T. 1711. K. B. 10 *Mod.* 148. *S. P. ANON. H. T.* 1663. C. P. 2 *Wils.* 173. *S. P. FLETCHER v. HENNINGTON.* E. T. 1760. K. B. 2 *Bur.* 944.

On a writ of error, from the court of C. B., in an action of debt on a bond conditioned for payment of money on the 25th of March. The defendant pleaded payment on the 20th. On this issue was joined, and a verdict given for the plaintiff, and judgment accordingly. It was contended, that if the verdict had been found for the defendant, and judgment given accordingly, all had been right; for payment on the 20th was payment on the 21st, and so on: but now the verdict being found for plaintiff, the issue was immaterial; for nonpayment on the 20th could be no evidence of nonpayment on the 25th, for the bond might have been paid in the meantime; 2 *Cro.* 434; *Cro. Eliz.* 828.—Judgment reversed.

3. *TRYON v. CARTER.* T. T. 1733. K. B. 7 *Mod.* 231.

A bond was conditioned for the payment of money, on or before the 5th of December. The defendant pleaded payment on the 5th of December, to which there was a replication negating the fact, and a verdict found for the plaintiff. A repleader was awarded, as being an immaterial issue; for it finds no breach of the condition, because it might be paid before the 5th of December, and then the condition is performed; and it is not like the case where a condition is to pay on such a day, for then there can be no legal payment till that day, an actual payment before being but in the nature of a deposit till the day. But here it would be a legal payment at any day. See 1 *Saund.* 102.

4. *LEGH v. LEGH.* T. T. 1799. C. P. 1 *B. & P.* 447.

In an action by the assignee of a bond, it appeared that the defendant, who was bound therein to the nominal plaintiff, had notice of the assignment, but nevertheless paid the nominal plaintiff, and took from her and pleaded a release. The Court refused to allow the plea on the ground of fraud in the defendant in obtaining the release. The defendant's counsel then applied for

* At common law it was a general rule, that where an action was founded on a deed, the defendant could only avoid it by matter of as high a nature as by an acquittance under seal; hence, to debt on a single bill, payment merely without an acquittance could not properly be pleaded; *Doct. Plac.* 107. But to debt on bond, with a condition for the payment of money on a day certain, the defendant might even before the statute of Anno, have pleaded payment at the day; *Doct. Plac.* 107; because such plea was in effect a plea of performance of the condition. But now by the 4 Anne, c. 16 s. 12 where debt is brought on any single bill, if the defendant has paid the money due thereon, such payment may be pleaded.

† For if issue be joined on payment, before the day, proof of payment before that time will be sufficient to support the plea of *solvit ad diem*; *Cro. Eliz.* 142; *Dyer.* 222, b; 7 *Mod.* 231.

On a plea of *no demand* to an action, on a bond payable on demand, the plaintiff must prove an express demand previous to bringing an action.

Solvit ad diem is proper, where the money has been paid before the day.

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For if the defendant plead *solvit ante diem*, and the plaintiff take issue in stead of demurring, he cannot have judgment.

And if to a bond conditioned that defendant shall, on or before, &c. be paid, and issue is joined thereon, and verdict be given for the plaintiff, a repleader must be awarded.

But where the obligor in a bond, having had notice of an assignment paid the obligee, and took a re-

lease from him, the Court

leave to plead payment, which the Court refused, as it would be in effect the same as pleading the release.

A transfer of stock is evidence on a plea of payment to an action on a bond.

would not allow a plea of payment to an action on the bond brought by the assignee.

5. BRETON v. COPE EXECUTOR. H. T. 1791. N. P. Peake. 43.

This was an action on a bond for 1000*l.* in which Lord Kenyon, C. J. said, that the transfer of stock to the party to that amount was good evidence of payment under a plea to that effect.

6. ROSE v. BRYANT. M. T. 1809. N. P. 2 Camp. 321.

[641] So an indorsement on a bond, acknowledging the receipt of interest and part of the principal, cannot be read to re

In order to destroy evidence of the payment of a bond in 1794, the plaintiff's counsel proposed to read indorsements acknowledging the payment of interest and part of the principal, to the year 1795. It did not appear when, nor by whom, they were written, nor that they were made during the life of the intestate, through whom the plaintiff claimed as administrator. The admissibility of this evidence was contended for by the plaintiff on the ground that no presumption of payment raised from length of time was attempted to be rebutted, and especially as these indorsements were contrary to the interest of the party making them, as diminishing his claim. Lord Ellenborough held that such indorsements could not be read, unless it was proved that they were made when the sums that they purported to acknowledge were paid.—Plaintiff nonsuited, but direct evidence of payment, unless the plaintiff proves that they made against the obligee when they were written.

2. *Solvit post diem.*

Before the 4 Anne. payment after the day could not be pleaded at common law.

1. NELSON v. FINCH. M. T. 1698. K. B. 1 Lord. Raym. 383.

In debt on bond, conditioned that whereas the plaintiff became bound to the defendant in a bond of 52*l.* conditioned for the true payment of 26*l.* on the 29th of September following; and if after the discharge of the said bond by the plaintiff, the defendant should make the plaintiff free of the clothworkers company on request, that then this bond should be void; the plaintiff showed, that he had paid the 26*l.* but the payment was not on the 29th of September, but afterwards, and that he requested the defendant, but that he had not made him free. And on demurrer, judgment was given for the defendant, because that payment of the 26*l.* could not discharge the first bond, being after the day; and therefore the plaintiff had no title to sue this bond as yet, because the defendant was not bound to make him free of the clothworkers company before the first bond was discharged.

But now payment before action brought may be pleaded.

By the 4 Ann. c. 16. s. 12. "where debt is brought upon any bond with a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the condition or defeasance, though such payment was not made strictly according to the condition or defeasance, yet it may be pleaded in bar of such action."

2. UNDERHILL v. MATTHEWS. E. T. 1714. C. P. Bull. N. P. 171.

Though this statute is confined to absolute payments, and does not apply to a ten. ter.

In debt on bond conditioned to pay money, it was resolved though the money were not paid at the day and place, yet if it were paid at a subsequent day, the defendant might plead it in bar; but the defendant could not plead a tender and refusal of principal and interest at a subsequent day in bar; for that is not within the equity of the statute; for if such construction prevailed, it would be prejudicial, as it would empower the obligor to compel the obligee at any time without notice to take in his money.

[642] Where no demand has been made upon a bond for 20 years, it is in itself a presumption that it has been

3. OSWALD v. LEGH. T. T. 1786. K. B. 1 T. R. 270. S. P. COLSELL v. BUDD. M. T. 1807. N. P. 1 Camp. 27. S. P. ANON. M. T. 1702. K. B. 6 Mod. 32 S. P. ANON. M. T. 1703. K. B. 6 Mod. 22. S. P. ANON. E. T. 1702. K. B. 11 Mod. 2.

In an action on a bond executed 17th January, 1765, it appeared that in June 1784, the obligee sued out a writ, but before it was executed he died. This action was commenced by the executor of the obligee, last Easter term; the parties resided in England, and were on friendly terms. The plaintiff obtained a verdict; and on motion for a new trial, on the ground that no demand having been made for 19 years and a half, the presumption should be, that the

bond had been satisfied; the Court said that in those cases where satisfaction of a bond has been presumed within a less period than twenty years, some other evidence has been given in favour of such a presumption; for even with regard to the rule of 20 years, where no demand has been made during that time, that is only a circumstance for the jury to found a presumption upon, and is in itself no legal bar. By Lord Holt, 6 Mod. 22; Lord Raymond, *Constable v. Somerset*, cited 1 T. R. 271; and Lord Mansfield, 4 Burr. 1963; it has been expressly said, that if a bond has lain dormant for 20 years it shall be presumed to be paid; here it had not remained dormant 20 years, and the question of presumption was left to the jury, who have presumed that it was not satisfied; the rule therefore must be discharged.

4. COLSELL V. BUDD. M. T. 1807. N. P. 1 Camp. 27.

A bond was made payable three months after the decease of one A. B., who died in January, 1787. No demand of payment was made before this action was commenced; and a witness swore that after the bond was payable, a meeting took place between the defendants and plaintiff's testator, when a sum of money was paid to a third party. It was, therefore, urged for the defendants, that the bond must be presumed to have been satisfied. But Lord Ellenborough said, that as the term of 20 years, usually recognized by the Court as the period after which a bond must be presumed to have been charged, had not elapsed; and as the evidence adduced did not amount to proof that the parties had entered into a settlement of their accounts after the bond became payable, the plaintiffs must recover.—Verdict for plaintiffs.

5. NEWMAN V. NEWMAN. M. T. 1815. N. P. 1 Stark. 101.

A bond was given by a remainder man in tail, in consideration of a cession by the plaintiff's testator of his tenancy for life in certain property. It was proved by a letter written by the defendant, that in 1792, the bond remained unpaid; but it was contended for the defendant, that the length of time that had elapsed since that period was fair ground for presuming that the bond had been satisfied. On evidence that the defendant had resided in America since 1792, Lord Ellenborough held that the defendant's absence that period fully rebutted the presumption contended for.—Verdict for plaintiff.

6. SEARLE V. LORD BARRINGTON. M. T. 1724. K. B. 2 Lord Raym. 1370; S. C. 2 Stra. 827; S. C. 3 Bro. P. C. 535; S. C. 8 Mod. 279; S. C. Eq. Abr.

414. S. P. MORELAND V. BENNETT. M. T. 1726. K. B. 1 Stra. 652.

This was an action of debt brought by an executrix on an old bond for money due to the intestate; and on oyer of the bond, and the condition thereof, it appeared to be dated the 9th year of W. 3. (which was 35 years ago,) and thereon the defendant pleaded he paid it at the day, on which issue was joined; and at the trial, the defendant offered to prove the issue by presumption, viz. this being a bond of more than 20 years standing, and no interest being paid in all that time, it must be presumed that the principal was paid on the day.

Now, to encounter this presumption, the plaintiff offered to give another presumption in evidence, and that was an indorsement of one year's interest after the bond was nine years old, which indorsement was written by the intestate's own hand; and whether that should be given in evidence at the trial, was the question. It was proved, that after the death of the testator, this bond was found amongst his papers, and that the testator was esteemed an honest man. No evidence was given to prove whether the indorsement was made by the obligee or obligor, or that this indorsement was ever seen by any person; on which the plaintiff was non-prossed; and the chief justice ordered that this matter should be referred by way of a case stated for the opinion of the Court.

Pratt, C. J. said, that at the trial he was of opinion that the indorsement ought not to be received as evidence, because it would leave too great a power in an obligee (in whose custody the bond always remains) to make such in-

* And such presumption is not rebutted by proof of the obligors poverty; *Willame v. Gorges*, 1 Campb. 217.

indorsements whenever he thinks proper; they may be made at any time, and so no bond can ever be presumed satisfied. But a new trial being granted, *Raymond, C. J.* suffered the indorsement to be read; and the jury found for the plaintiff. The defendant tendered a bill of exceptions; and a writ of error was brought in the Exchequer Chamber, and the bill of exceptions returned as parcel of the record; and the judgment of this court was affirmed, and afterwards affirmed in parliament.

7. *ROSE v. BRYANT.* M. T. 1809. K. B. N. P. 2 Campb. 321.

But the admissibility of such evidence seemed doubtful, the contrary having been ruled at Nisi Prius. [644] Action on a bond. Several indorsements on the bond acknowledging the receipt of interest down to 1793, were proved to be in the hand writing of the defendant, and signed by the testator. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff, for the purpose of meeting certain direct evidence of payment in the year 1794, proposed to read other indorsements on the bond down to the year 1795, acknowledging the receipt of interest, and part of the principle; but these latter indorsements were not in the defendant's hand, nor did it appear when they were written, nor even that they existed during the testator's life-time. An objection being taken to their being read, Lord Ellenborough, C. J. said, indorsements in the hand-writing of the obligee, acknowledging the receipt of interest and of part of principal, are not evidence that the bond was unsatisfied, unless it can be shown that such indorsements were on the bond at, or recently after, the time they bear date, and that they were written at a period when they operated against the writer's interest. Nonsuit.

(h) *Release.* See div. Discharge.

Before the 4 Anne. in an action on a bond conditioned for the payment of money only, the courts would relieve the defendant against the penalty on payment of the principal, interest, and costs. And upon bringing the penalty into court. But now the penalty need not be brought into court. [645] To debt on bond, the defendant may plead a release by the plaintiff, after the bond given; see 7 T. R. 670; 1 B. & P. 447.

(i) *Set-off.* See tit. Set-off.

(G) STAYING PROCEEDINGS.

1. *IRELAND'S CASE.* H. T. 1703. K. B. 6 Mod. 101. S. P. *LE SAGE v PERE.* M. T. 1702. K. B. 7 Mod. 114.

On motion for leave to bring the principal, interest, and costs, into court, and to be relieved against the penalty of a bond; it was urged on the other side, that in this case they would not relieve in chancery, unless the obligor would pay a debt barrable by the statute of limitations and insisted on the like benefit here this being an equitable motion. The Court refused to hear of it, but made the common rule.

Note.—The whole penalty must be brought into court, because the interest and full costs are to be taxed; and the remainder may be taken out immediately. Vide Mod. Rep. vol. vi. p. 101.

2. *GREGG'S CASE.* E. T. 1705 K. B. 2 Salk. 597, S. P. *ANON.* M. T. 1703. K. B. 6 Mod. 11.

Per Holt, C. J. In debt upon a bond, defendant must bring in the whole penalty, or the Court will not stay the proceedings.

By the 4 & 5 Anne. c. 16. "In an action on a bond with a penalty, if the defendant bring into court, where the action is depending, all the principal and interest, and all costs expended in any suit in law or equity upon such bond, the money brought in shall be taken in full satisfaction of such bond, and the Court may give judgment to discharge the defendant of and from the same."

3. *FARQUHAR v. MORRIS.* H. T. 1797. K. B. 7 T. R. 124.

On a rule to show cause why a bond, dated on a day certain, in a certain sum, but wherein no day of payment was expressly named, nor interest reserved, should not be referred under the 4 Anne. c. 16. s. 13. to compute what was due for principal, interest, and costs; and why, on such reference, proceedings should not be staid; the master applied to the Court, he entertaining doubts as to his being able to proceed, on the 12th section of the statute of Anne, only referring to bonds which are payable at a day or place certain; as in the case before him there was no day specified in the bond.

Per Cur. This bond being payable from the day of the date, is a bond pay-

able at a day certain; and therefore within the meaning of the act. And being day of payment is named, and within the statute, interest is payable from the time of payment, namely, from the date. though interest be not reserved.

4. *SISNEY v. NEVINSON*. E. T. 1725. K. B. 1 Stra. 699.

The plaintiff brought an action of debt on a bond against the defendant, as administratrix; and filed a bill in equity to discover assets; and had instituted a suit in the spiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought in this court, where the judgment was reversed. After which, the plaintiff brought a fresh action, and the defendant moved to stay proceedings, on the statute for amendment of the law, on paying principal, interest, and costs. And now on motion for the Court's direction to the master in taxing the costs, it was insisted for the plaintiff, that the defendant ought to pay the whole costs of the first suit, the proceedings in Chancery and the spiritual court; and the case of *Merrill v. Jocelyn*, Trin. 13 Ann. was cited for that purpose. *Per Cur.* We have nothing to do to order costs for proceedings in another court, which has power to award costs, if the party is entitled to them; and as to the judgment that is reversed, there is no reason why the defendant should pay for the error and mistake of the plaintiff. We are of opinion the proceedings in this cause must be stayed, on payment of the costs of this suit. But the plaintiff is not entitled to the costs of a former suit, where the judgment has been reversed on a writ of error.*

5. *VANSANDAU v. —* M. T. 1817. K. B. 1 B. & A. 214.

Action on a bond payable in 1820, conditioned for the payment of interest half yearly. The declaration assigned as a breach, the non-payment of a half-year's interest. It appeared that the interest had been demanded, and that the defendant, through the mistake of his agent having neglected to pay the interest, the plaintiff filed a bill; when the defendant took out a summons to stay the proceedings on payment of interest and costs. On the case coming before Bayley, J. he was of opinion that the proceedings ought to be staid on payment of the costs and interest, since the bond had become forfeited by a mere slip. But on motion to discharge the order, the Court said, it had been improperly granted, since the bond had become forfeited by the defendant's own laches, and thereby he had given the plaintiff an advantage of obtaining a judgment for the whole penalty; however, after the judgment has been obtained, we may interfere, but it must stand as a security.—Rule absolute. So in an action on a bond conditioned for payment of a sum of money at a future day, which had been forfeited by an accidental omission in paying the interest, the Court refused to stay the proceedings on payment of interest and costs.

6. *TIGHE v. CRAFTER*. E. T. 1810. C. P. 2 Taunt. 387. S. - P. *MASFEN v.*

TOUCHET. E. T. 1769. C. P. 2 Blac. 706.

A rule nisi was obtained to stay the proceedings in an action on a bond, on paying the interest due, and the costs of the action; but was opposed on the ground that the default in paying the interest had the effect of wholly avoiding the bond. The Court concurred, and discharged the rule, observing that they would restrain the execution, if the plaintiff should levy more than was fit. [646] But they will limit the execution to the arrears.

7. *GOWLETT v. HANFORTH*. M. T. 1774. C. P. 2 Blac. 958.

The defendant was bound to G. the plaintiff's testator, in a bond conditioned to pay 40*l.* by instalments, and if default were made in the payment of any one or more of the instalments, then the bond to stand in force for the whole principal and interest then remaining due and unpaid. On default made, the plaintiff put the bond in suit, and on *non est factum* pleaded, obtained a verdict. A motion was afterwards made to stay proceedings on payment of the instalments then due, with costs. Gould and Blackstone, Js. held, that upon this and on a special condition the defendant was not entitled to this indulgence, either under the act of 4 & 5 Ann. or 8 & 9 W. 3 c. 11. s. 8. This is not to relieve against a forfeiture, for the plaintiff at his peril must enter up judgment for more than the residue of the principal and interest *bona fide* due and unpaid. The defendant had by his neglect lost the benefit of the condition of the bond, and remained in the case of other debtors upon bond. So proceed in on bonds for payment of money by instalments and on default to stand in force for the whole sum due, will not be stayed up on payment of the instalments in arrears.

8. *ORCHARD v. IRELAND*. H. T. 1703. K. B. 2 Lord Raym. 1033.

* Though the plaintiff is entitled to the costs of proceedings in equity, relating to the same matter; See *Ca. Temp. Hard.* 116,

But proceedings will be stayed on payment of principal, interest, and costs, without compelling the defendant to waive the statute of limitations in respect of a simple contract debt, and the plaintiff makes to him.

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Upon this stat. the application to refer an action on a bond, must, it seems, be made judgment;

But not after verdict.

The plaintiff brought an action of debt against the defendant on a bond, conditioned for the payment of money at a day long since past; on which the defendant's counsel moved, that on payment of principal, interest, and such costs as the master should tax, proceedings should be staid in this action. The plaintiff's counsel opposed it, because the defendant was indebted to the plaintiff on a simple contract, to which the defendant threatened he would plead the statute of limitations, it being above six years since the debt was contracted, and no revivor since; and therefore since this motion was not for a matter of right, but for a favour, it was in the discretion of the Court, whether they would grant it or not; it was also insisted, that if the defendant would have equity, he must do equity, and therefore hoped the Court would not refer this action, unless the defendant would waive his plea of the statute of limitations, or refer that cause of action to the master as well as the other. But the court granted the motion, and said, the debts were distinct, and the plaintiff by his own negligence had lost the simple contract debt, and it was not in their power to deprive the defendant of the benefit of the statute, which the law had given him. See Raym. vol. ii. p. 1033.

9. BOSWORTH V. BOSWORTH. T. T. 1819. C. P. 3 Moore. 590.

A rule to refer to the prothonotary to ascertain what was due for principal and interest to a common money bond, was opposed on the ground that no reference could be made before judgment. The Court at first doubted whether the application could be made by the defendant, but on referring to the secondary made the rule absolute.

10. EASTMOND V. HOLLI. M. T. 1816. Ex. 3 Price. 219.

In an action on a bond after a verdict, for principal and interest which exceeded the amount of the penalty, an application was made for a reference to the master to take an account of what was due to the plaintiff for principal and interest and costs and why upon payment of such sum the proceedings should not be staid.

It was admitted that the present motion was novel after verdict, and that though the 4 Ann. had authorised such application pending suit, there might be some difficulty on the ground of delaying the plaintiff's execution; but it was urged that the present was a proper case for the interference of the Court if they should consider they had jurisdiction. But the Court said, to grant the application would occasion delay to the plaintiff, even if it could be done and that such applications would be too numerous; besides, the defendant comes too late, he should have saved the plaintiff all the expense and trouble which he has been put to.—Rule refused.

(H) SUM RECOVERABLE.*

1. JOHNES V. JOHNES. T. T. 1814. Ex. Ch. 5 Taunt. 656.

A judgment of the Court of K. B. in an action on a bond having been affirmed in error, a motion was made that the plaintiff might have interest allowed on the bond, from the period of the judgment below to that of the affirmance. Held that the stat. 8 & 9 W. 3. was definitive.—Motion refused

Where error has been brought in an action on a bond, the Court will not grant interest from the period of the judgment below to that of the affirmance.

* On the forfeiture of a bond, the whole penalty was formerly recoverable at law, but the courts of equity interposed, and would not permit a man to take more than his conscience he ought; viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, and the like. And a similar practice having gained some ground in the courts of law, the statute of 4 & 5 Anne' c. 16. enacted that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interests and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge. In general, there can be no remedy at law, beyond the penalty, for a man can have no more than his debt, and the penalty is the utmost of his debt; see 6 T. R. 303; 2 Marsh. 226; and see M'Cluse v. Dunkin, 1 East. 136. in which it was determined, that in an action on a judgment recovered on a bond, interest might be recovered in damages beyond the penalty. But Lord Kenyon, C. J. admitted, that if the action had been upon the bond, it would have been otherwise: see 2 T. R. 388; 6 East. 564; 10 Ves. 409; yet in Francis v. Wilson, 1 R. & M. 105. where the penalty was for the same sum as the amount secured, it was holden, that interest was recoverable, though it exceeded the amount of the penalty. And where the obligee is plaintiff, equity in general will not carry the debt beyond the penalty, he having made himself the judge of his recompence; see 1 Vern. 360; 1 Salk. 154; 2 Vern. 509; 2 Bro.

2. DIXON v. PARKES. H. T. 1794. N. P. 1 Esp. 110.

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A bond was made payable at a certain period after the arrival of a vessel at Canton, with a reservation of a higher rate of interest, if the payment was delayed beyond that time; three months after the time prescribed, the plaintiff received the principal and interest to the day fixed for payment, after the rate and brought an action on the bond for the further interest, but the Court said that the plaintiff could not recover in this form of action, as *solvit post diem*. would under the stat. 4. & 5 Ann. c. 16. be a good plea.

3. AMERY v. SMALLRIDGE. E. T. 1771. C. P. 2 Blac. 760.

In debt on bond for 60*l.* and on a *mutuatus* by note of hand for 30*l.* there was a verdict for the plaintiff for the whole debt of 90*l.* and damages; the taxed costs, including the damages, were 29*l.* 5*s.* so the judgment was entered, and the defendant charged in execution for 119*l.* 5*s.* It was now moved to reduce the sum to 97*l.* 11*s.* 10 1-2*d.* in order to bring the defendant within the lord's act; the sums actually due for principal and interest upon the bond, for the damages and costs; and upon this note of hand, amounted only to 97*l.* 19*s.* 10 1-2*d.*; and the plaintiff insisted that he had a right to add to this sum 13*l.* 3*s.* 5*d.* for interest due on the note of hand, and cover it under the penalty of the bond, which would make the true sum for which the defendant was chargeable amount to 111*l.* 3*s.* 3 1-2*d.* but as the plaintiff had neglected to have this interest found as damages for the detention of the money due on the *mutuatus*, which he might have done, it was ruled, by the Court, that he had no right to cover this under the penalty of the bond.

JUDGMENT AND EXECUTION.

Judgment is usually entered up for the whole penalty specified in the bond, and remains as a security. But execution will be staid upon payment of the sum really due; see 2 Purr. 825. If two be jointly bound, and judgment be obtained against both, execution must also be taken out against both. and must be of the same nature. So if two be jointly and severally bound, and there is judgment in an action against both, the execution must be joint against both, and of the same nature; consequently a *capias* cannot be taken out against one, and an *elegit* against the other; for though the plaintiff might have sued them severally, yet, by suing them jointly, he has made his election, and the execution must follow the nature of the judgment; and though they be several persons, yet they make but one debtor when sued jointly. But if the obligor sues them severally, he may sever them in their kinds of executions; for though the obligation be but one, yet the original suits, pleadings, judgments, and execution, are as different as if they were with reference to several obligors: see Hob. 59; Cro. Eliz. 648; 2 Sid. 12; Mod. 2; Roll. Abr. 888-9; 1 Chit. Pl. 30-1. But if there be a joint judgment against two, and one die, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at common law, the charge upon judgment being personal, survived; and the statute of Westm. 2; 13 Edw. stat. 1. c. 45. that the *elegit*, does not take away the remedy of the plaintiff at the common law; and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*. But if he should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion or by *audita querela*; see Raym. 26; Lev. 30; Keb. 92.

P. C. 489; 1 Atk. 75; 3 Bro. C. C. 489; id. 496; Dick 305; Dick 408; Dick 514; 2 Anstr. 525; 3 Ves. 557; 4 Ves. 329; but it is otherwise where the obligee is defendant; for then the maxim applies, that he who will have equity must do equity; 1 Eq. Abr. 92 pl. 7; and equity will, under special circumstances carry a debt beyond the penalty, as where a man is kept out of his money, by an injunction, or is prevented from going on at law; see Show P. C. 15; or where an advantage is made of money; see 2 Bro. P. C. 251; or where a bond is only taken as a collateral security; 2 Bro. P. C. 338; or where the recovery of the debt is delayed by the obligor; see 6 Ves. 192; or there are some other special circumstances; see 6 Ves 416.

X. RELATIVE TO THE OBLIGEE'S REMEDY AGAINST THE HEIR OR DEVISEE OF OBLIGOR.

1. CONEELS V. WATSON. M. T. 1666. K. B. 1 Lev. 224.

Debt* on the bond of the ancestor for ought to be brought against the heir in the debt and detinet.

Action of debt against the heir, on a bond of his ancestor, in the *detinet* only. After verdict, it was moved, that it ought to be in the *debet* and *detinet*, and of that opinion were the Court at first: but it was subsequently resolved to be cured by the statute of jeofails, 16 & 17 Car. 2. c. 23. being after verdict, though not by the particular words of the statute, yet it was by those general words in the statute, and *other like cases*.

2. BUCKLEY V. NIGHTINGALE. M. T. 1725. C. P. 1 Stra. 665.

And he is not liable for the debt of his ancestor beyond the value of the lands descended; [65] therefore, as soon as he has paid his ancestor's debt to the value of the land, he is entitled to hold it discharged.

The plaintiff, as administrator of the goods and chattels of Joan Terry, widow, deceased, which were unadministered by John Terry, deceased, who was the executor of the said Joan, brought an action of debt against the defendant, the son and heir of Matthew (the father,) for the payment of 200*l.* due on a bond to the said Joan. The defendant pleads, and admits, that he is son and heir of the said Matthew, the obligor, but says, that he the said obligor his father, in his lifetime was seized of a messuage or tenement called Pryons; and in consideration of the sum of 300*l.* demised the same to J. S. for 99 years, reserving only a peppercorn yearly rent; and that the said defendant hath not any lands or tenements by hereditary descent, nor had he *ad diem impetrationis brevis originalis præd.* or at any time after, except the reversion of the said messuage and tenement, and one messuage and three roods of land in R., being, together, of the value of 300*l.* and no more; and then he sets forth, that the obligor his father, in his lifetime, before his entering into the said bond upon which this action was brought, did become bound to one Thomas Poole, in 120*l.* which last bond, at the time of his decease, was in full force and undischarged; and then goes on, and sets forth in like manner,* three other bonds, each for the sum of 200*l.*, in which his said father was bound to three other persons, and shows that he died, and left the said bonds standing against him in full force and virtue; then the defendant says, that long *ante impetitionem brevis originalis præd.* of the plaintiff, viz. upon the 1st of June, 1720, he, the defendant, agreed with the several persons aforesaid, to whom his father was bound, to pay them the several sums aforesaid, which, in the whole, amounted to 600*l.* which, he avers, is more than the value of the said messuage and tenement, and lands in R., and the reversion, *et petit judicium si ipse ut filius et hæres ipsius Matthei patris de debito præd. virtute scripti præd. onerari debeat, &c.*; and then avers, that the said Joan Terry, in her lifetime, refused to accept, in satisfaction of her said debt, her proportion of the said sum from the defendant, together with the rest of the said creditors. To this plea the plaintiff demurred; and, upon argument, the whole Court were of opinion, that the defendant's plea was good; for though it was the defendant's debt, because his ancestor had bound him, yet he is liable no further than to the value of the land descended; and, as soon as he has paid his ancestor's debts to the value of the land, he shall hold the land discharged, otherwise he might be chargeable *ad infinitum*. The cases which are cited in the argument were 20 H. 7. c. 5. s. 6; Keilw. 62. 63. 64; 26 H. 8; 1 Plow. 440.

And he is not liable to that extent if he has bona fide aliened the same before action brought.

By 3 & 4 W. & M. c. 14. s. 5. where any heir at law is liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before action brought, or process sued out against him, he shall be answerable by action of debt for such debt, to the value of the land so sold, &c. in which all creditors shall be preferred, as in actions against executors and administrators; and

* Will lie against an heir having assets by descent in fee simple, on the obligation of his ancestor, wherein the law is expressly bound; see 1 Inst. 209. a; 2 Saund. 136; 1 Ves. 212. The law considers the bond of the ancestor, wherein the heir is bound, as becoming upon the death of the ancestor, the heirs own debt, in respect of the assets, which the heir has in his own right, and holds him liable upon such bond to the value of the land descended; see Gilb. Debt. b. 2 c. 1.

† Where the obligor has heirs and lands on the part of his father, and on the part of his mother, both heirs shall be equally charged; see 11 H. 7. 12 b.

such execution shall be taken out on any judgment so obtained against such heir, to the value of such land, as if the same were his own proper debts, saving, that the lands, &c. *bona fide* aliened before action brought shall not be liable to such execution.

3. DENHAM v. STEPHENSON. M. T. 1704. K. B. 1 Salk. 355.

Plaintiff brought debt on bond, as administrator, against the defendant, as heir of his ancestor; and, upon demurrer, an objection was taken, that he did not show how the defendant is heir, and Hob. 333. was cited. And, *Per Cur.* Where H. sues an heir, he must show his pedigree, and how he is heir, for it lies in his proper knowledge; but where one is sued as heir, he need not, for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree.

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The declaration, when a gainst the defendant as heir, need not show how the defendant is heir.

4. JENK's CASE. H. T. 1628. K. B. Cro. Car. 151.

To debt on bond against the defendant, as brother and heir to J. S. the defendant pleaded *riens per descent* from his said brother; and issue being joined thereupon, a special verdict was found, that the obligor was seized in fee of such lands, and had issue, and died seised, and the issue died without issue; whereupon the lands descended to the defendant as heir to the son of his brother. After argument, it was adjudged for the defendant; for although he is chargeable as heir upon this bond, yet he is but a collateral heir, and the plaintiff ought to have declared specially.

But the declaration a gainst the defendant as collateral heir, ought to charge him specially, and show the meane descents.

5. KELLOW v. ROWDEN. E. T. 1689. K. B. Carth. 126; S. C. 3 Lev. 286; 3 Salk. 178. S. C. 1 Show. 244; S. C. Holt. 71. 336.

A. being seised in fee, bound himself and his heirs in a bond, and having two sons, B. and C. limited the estate to himself for life, remainder to his eldest son B. in tail, remainder to his own right heirs, and died; whereupon B. became seised in tail, with remainder in fee expectant, and afterwards died leaving a son, D. who became seised in like manner, and afterwards died without issue, upon whose death the premises descended to C. in fee, the estate tail being then extinct; an action having been brought on a bond against C. as son and heir to A. and *riens per descent* from A. pleaded, it was holden, that the declaration charging the defendant as immediate heir of A. and not mentioning the *meane descent*, was proper.

Though the preceding rule as to stating the meane descents applies only to descents from per sons seised in fee simple in possession.

By 3 & 4 W. & M. c. 14, s. 6. it is enacted, that where debt upon a penalty is brought against any heir; he may plead *riens per descent* at the time of the original writ brought, or bill filed against him; and the plaintiff may reply, that he had lands, &c. from his ancestor before original writ brought, or bill filed; and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given, and execution awarded as aforesaid, that is, against the heir to the value of the land, as if the same were the proper debt of the heir; but if judgment be given against such heir by confession of the action, without confessing assets descended, or, upon demurrer, or *nil dicit*, it shall be for the debt and damages, without any writ to inquire if the lands, &c. descended; see Carth. 129; Dyer. 373. b.

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If after plea of *riens per descents*,* and replication traversing that fact, verdict be given for plaintiff, judgment shall be for debt and damages generally; but if the defendant confess, judgment shall only be for the

* The plea of *riens per descent* is, that the heir has not, nor had at the commencement of the suit, any lands or tenements by hereditary descent from the ancestor in fee simple; Doctr. pl. 181; to which plea the plaintiff may reply that the defendant had assets by descent in fee simple, upon which issue is usually joined; and it is for the plaintiff to prove that the defendant has assets. A question frequently arises upon this issue, whether the heir takes by purchase or descent, with respect to which it may be said, if lands are devised to the heir, and the devise does not make any alteration, either in tenure, quality, or limitation of the estate, that is, if the devise conveys either in tenure, quality or limitation of the estate, that is if the devise conveys to the heir the same estate as the law would cast on him by descent, then the heir takes by descent although by the term of the devise there is either a possibility of a charge; see 1 Salk 241; or an actual charge and incumbrance on the lands; see 1 Stra. 1270; S. C. 1 Blac. 22; as payments of debts and legacies. and the like; see Lord Raym. 728; Moore 644; Vaugh. 271; 5 M. and S. 14.

The words of the plea being that the defendant has not any lands by descent at the time of the original writ brought, or bill filed against him; it is clear that the defendant cannot avail himself of an alienation pending the suit, and that the lands so aliened, will remain

assets descended.^{*}
A devise for the purpose of defrauding bond and other creditors, is void;[†] and if the devisees plead a false plea, they are personally liable.

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By 3 & 4 W. & M. c. 14. s. 2. it is enacted, that all wills and testaments, limitations, dispositions, or appointments, concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge thereout, whereof any person at his decease shall be seized in fee simple, in possession, reversion, or remainder, or have power to dispose of by will, shall be deemed, only as against creditors by bond or specialty, in which the heirs are bound, their heirs, executors, administrators, and assigns) to be fraudulent and absolutely void.

By sect. 3. every such creditor may maintain his action of debt on his bond and specially against the heir-at-law of such obligor and such devisees jointly; and such devisee shall be liable for false plea pleaded, or for not confessing the lands, &c. to be descended to him.

By sect. 4. Provided, that all limitations or appointments, devises, or dispositions of any manors, &c. (as in sect. 2.) for the payment of any just debt, or any portion for any child, other than the heir at law, according to any marriage contract in writing, *bona fide* made before such marriage, shall be of full force, and such manors, &c. shall be holden by such person, his heirs, executors, &c. for such limitation &c. (as was made, and his trustees and their heirs, executors, &c. for the estate so limited, &c. until such debt or portion is raised. And,

By sect. 7. All devisees made liable by this act, shall be liable in the same manner as the heir-at-law by force of this act is, notwithstanding the lands, &c. to them devised are aliened before action brought.

XI. RELATIVE TO THE REMEDY ON A BOND IN CASE OF BANKRUPTCY.

(A) IN CASE OF THE BANKRUPTCY OF OBLIGEE. See tit. Bankrupt.

(B) IN CASE OF THE BANKRUPTCY OF THE OBLIGOR OR OBLIGORS. See tit. Bankrupt.

XII. RELATIVE TO THE REMEDY ON A BOND IN CASE OF INSOLVENCY.

(A) OF THE OBLIGEE. See tit. Insolvent Debtors' Act.

(B) OF THE OBLIGOR OR OBLIGORS. See tit. Insolvent Debtors' Act.

XIII. PROCEEDINGS UNDER THE 8 & 9 W. 3. c. 11. s. 8. See tit. Covenant.

[654] **Bond of Resignation.** See tit. Resignation Bond.

Books. In general.

See tit. Copyright,
Inspection.

Subpoena duces tecum.

When evidence.

charged; See 1 Inst. 102. a. b. If issue be joined upon such plea, the plaintiff should prove the lands came to the defendant by descent; and if the defendant gave in evidence a conveyance of the same lands by himself to a stranger before action brought, the plaintiff may to encounter this evidence, prove the conveyance was fraudulent, and therefore void by statute 13 Eliz. c. 5. And the heir cannot plead assets in the hands of the executors, for it is at the election of the obligee to sue either the heir or the executors; 10 H. 7. 8. b.; but he may plead his non-age, and pray that the parcel may demur; Gilb. Hist. of C. B. 56. This privilege is confined to infant heirs; see 4 East. 485; to whom lands have come by descent from the specialty debtor, and not being expressly given to infant devisees by the preceding statute, they cannot claim the benefit of it; *ibid*.

^{*} But if the heir pleads payment, by a co-obligor, and it is found against him, the judgment shall be general, that is, to recover the debt and damages. As the judgment against an heir, upon *riens per descent* pleaded, and found against him; see 2 Leon. 11; 21. Edw. 3 8 b. pl. 28; is general, so is the execution. And the plaintiff may have execution by writ of *eliget* of a moiety of all the lands of the heir, as well of those which the heir has by purchase, as of those which he hath by descent; see 2 Roll. Abr. 71. pl. 3; if the heir suffers judgment to go by default, and does not show with certainty the assets descended, the judgment shall be general, and the execution may be awarded against the heir as for his own debt, by *capias ad satisfaciendum* against his person, or *feri facias* against his goods and chattels; see Moore. 522; Cro. Eliz. 692; Plowd. 440. If judgment be given against the heir upon demurrer, the body of the heir may be taken in execution; see Plowd. 440; Lord Raym. 783.

[†] Before the passing of the 3 & 4 W. & M. such lands in the hands of the devisee or alienee, were not liable to the specialty creditor.

See *tits. Corporation. Loghook. Lloyd's Book. Master's Office, K. B. Navy Office. Parish. Prison. Secretary of Bankrupts Stock. Tradesmen.*

Bookbinder. See *Apprentice*, vol. ii. p. 67.

Bookkeeper. See *tit. Carrier.*

Booking-office. See *tit. Carrier.*

Bookseller. See *tits. Copyright; Master and Servant.*

Vote. See *tit. Common.*

Borough. See *tit. Justice of the Peace.*

Borough English.

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CLEMENTS v. SGUDAMORE. H. T. 1702. K. B. 2 Ld. Raym. 1024; S. C. 1 Salk. 243; S. C. Holt. 124; S. C. 6 Mod. 120; S. C. P. Wms. 63.

In ejectment a special verdict was found; viz. A. had five sons, and the youngest son died in the life time of his father, leaving issue a daughter; after which the father purchased copyhold lands of the nature of borough-English, which by custom, were descendible to the youngest son and his heirs. The father died seized, and the fourth son entered; and now the question was, whether the fourth son, or the daughter of the fifth son, should inherit these lands. The Court were of opinion, the daughter shall inherit by right of representation; for by this custom, the youngest son is put in the place of the eldest at common law; and, as at common law, the issue of the eldest is preferred by right of representation, so by this custom shall the issue of the youngest. If a man seized of lands of the custom of gavel-kind, have issue three sons, and one of the three dies leaving issue a daughter, in the life of his father, this daughter shall inherit the part of her father, and yet she is not within the words of the custom, for she is no male, but the daughter of a male and heir by representation. In the year 1560 there was a cause, *Fane v. Barr*; it is entered *Hilary, 1659. Rot. 779*. The custom was that the copyhold land of every tenant dying seized descended to the youngest son. A surrender was made to the use of A. and his heirs. A. died before admittance; and it was agreed his youngest son should inherit if A. had been admitted; but in this case A. being not admitted, it was adjudged the Elder son should inherit, and that is by reason of the strictness of the custom, which required a seisin and a dying seized; But by the report I have of that case the Court said it had been otherwise if this land had been found to be of the custom of borough-English or gavel-kind; for the law takes notice of these customs, but not of such special customs, which must be pleaded by him that would take advantage of them, and must be taken by the Court to be as they

Where lands would at common law descend to the issue of the eldest son, *jure representationis*, they will by the custom of borough English* descend up on the issue of the youngest son.†

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* With respect to lands held in Borough English. Littleton says, sect. 165. some boroughs have a custom, that if a man has issue many sons, and dies, the youngest shall inherit all the tenements which were his father's within the same borough, by force of the custom; 7 Vin. Abr. 560.

This custom extends to estates tail, and also to descendable freeholds; thus Lord Coke says, 1 Inst. 110. b. "If lands of the nature of borough English, be letten to a man and his heirs during the life of J. S., and the lessee dieth, the youngest son shall enjoy it."

But as borough English may be excluded by special custom, so may it be restrained; and therefore the customary descent may be confined to fee simple; see *March. 56*. The custom of borough English is, however, confined to lineal descents, and does not extend to collateral ones; so that where lands held in borough English descended to the youngest son, and he died without issue, it was resolved that they did not go to the younger brother; for the custom did not take place in the descent between brothers, but the eldest brother inherited. Lord Coke has, however, said, that by some customs, the youngest shall inherit; but this extension of borough English to the collateral line must be specially pleaded; *Rob. Gav. 93; Cro. Jac. 198; 1 Inst. 1106. n. 3*. The youngest son, when entitled to the lands by the custom of Borough English, shall have the writ of error to reverse a fine, and not the heir-at-law, because this remedy descends with the land; 1 Leon. 261; and for general information as to the nature and properties of borough English, see Mr. Robinson's excellent treatise.

† If copyhold land of the tenure of borough English be surrendered to the use of another person and his heirs, and he dies before admittance, the right shall descend to the youngest son; *Baker v. Dereham*, cited in *Blackburn v. Graves*, 1 Mod. 102. abridged post, Copyhold.

are set forth by the pleading and no otherwise. In the case at bar, the custom is expressly found to be descendable to the youngest son and his heirs, though the words "his heirs are needless, for the law would imply all necessary incidents and consequences in the course of descents." If the father be disseised and die, the right of entry shall descend to the youngest son; if the younger son die, the same right of entry shall descend to his daughter, and the youngest son being heir by custom, shall have his age as if he were heir at common law. And the court denied the case of 1 Leon. 109. 208., and inclined against the opinion of Croke in 1 Cro. 410; and said if a lease be made to H. and his heirs, for three lives, of lands of the nature of borough-English, this descendable freehold shall go to the youngest son, though it is a new created estate, for the custom is inherent in the land; and so it is of a rent, for it issues out of the land; and the introducing the same rules of descent in all cases relating to the same lands, tends to quietness and certainty.

All contracts by way of bottomry on ships in the service of [657] foreigners bound to trade with in the limits of the East India Company's charter, are void.

And all sums of money lent on bottomry, or at respondentia, upon any ships belonging to his majesty's subjects bound to or from the East Indies, or upon any merchandize, shall be so expressed in the condition of the bond.

Bottomry Respondentia Bonds.*

1 By the 7 Geo. 1. c. 21. s. 2. it is enacted, that all contracts and agreements made or entered into by any of his majesty's subjects, or any person or persons in trust for them, for the loan of any money by way of bottomry, on any ship or ships in the service of foreigners, and bound to, or designed to trade in the East Indies, are void.

By the 19 Geo. 2. c. 37. s. 5. it is enacted, that all sums of money lent on bottomry, or at respondentia, or to any ship or ships belonging to his majesty's subjects, bound to or from the East Indies, should be lent only on the ship, or on the merchandize and effects, laden or to be laden on board of such ship, and should be so expressed in the condition of the said bond, and the benefit of salvage should be allowed to the lender, his agent or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at respondentia, shall recover more on any insurance than his value of the interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship, or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed as he had not laid out on the ship, or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandize should be totally lost.

* Are instruments entered into by the owners of a ship, for the purpose of raising money to enable them to prosecute their destined voyage. By the bottomry bond, the owners pledge the keel or bottom of the ship, which is used figuratively to express the whole body thereof, as a security for the repayment of principal money advanced, and such interest as may be agreed upon, on this condition, that if the ship be lost, the lender is not entitled to a return of his money. By the respondentia contract, the borrower pledges not the vessel but the cargo therein, which is in effect pledging merely his own personal responsibility as from the terms and nature of the transaction it neither does nor can furnish the lender with any specific lien on the particular goods. There is also this further difference between bottomry and respondentia contracts, the one is a loan upon the ship, the other upon the goods; in the former the ship and tackle are liable, as well as the person of the borrower; in the latter for the most part, recourse must be had to the person of the borrower only. There is this peculiarity attending the bottomry and respondentia contracts, that on a loan upon bottomry the lender runs no risk, though the goods should be lost, and upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of respondentia are upon the same footing; the rules applicable to one are applicable to both; see 2 Blac. Com. 457-8; Marsh on Insurance, 738; Holt on shipping, 125-6; 2 Park on Insurance, 552. There is another species of contract which does not exactly fall within the description of either, namely, a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself; as if a man lend 1000l. to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition,

2. SUMNER V. GREEN. M. T. 1789. C. P. 1 H. Bl. 301.

A question in this case arose whether an American ship, since the declaration of American Independence, was a foreign ship within the statute of the 7 Geo. 1. c. 21. s. 2. which interdicts bottomry bond being entered into by a foreigner, on a cargo intended for the East Indies. It came before the Court upon motion to discharge the defendant out of custody on entering a common appearance. The defendant was held to bail upon a *respondentia* bond, which was executed by the defendant, who was an American, upon a cargo shipped by the plaintiff on board an American ship in the East Indies, homeward bound from Calcutta to Rhode Island in America. The ship had sailed from England, and landed a cargo of European goods in Bengal, previous to her taking in the cargo on which the bond was given. But the Court, though they seemed to think the bond void, being within the mischief intended to be remedied by the statute, said, as the question was of considerable importance, they thought it ought not to be discussed on a summary application. The defendant was discharged on another ground.

3. JOY V. KENT. E. T. 1641. Ex. Hardres. 418.

Debt upon bond, conditioned to pay a certain sum, if the ship W. return within six months from Ostend to London (which was more than the lawful interest of the money,) and if she did not return, &c.. then the bond to be void. The defendant pleaded, that there was a corrupt agreement between him and the plaintiff, and that, at the time of making the bond, it was corruptly agreed between them, that the plaintiff should have no more than lawful interest in case the ship should ever return; and averred, that the bond was entered into by covin, to evade the statute of usury and avoid the penalties; upon this averment the plaintiff took issue, and the defendant demurred, for that the plaintiff did not traverse the corrupt agreement, and that the averment is but the result thereof. Hale, Ch. B. held clearly, that this bond was not within the statute, for it is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed; and that it is not like the case where the condition of the bond is to pay so much money if such person be then living, for there is a certainty of that at the time, but it is altogether uncertain whether the ship shall return or not. But he agreed that the issue on the averment was well taken, because it discloses the manner of the agreement. And though the corrupt agreement might have been traversed, yet the averment was likewise traversable; and the demurrer to the replication nought. See Sharpley v. Harrel. Cro. Jac. 208; Roberts v. Tremayne. Cro. Jac. 508.

4. SAYER V. GLEAN. H. T. 1662. C. P. Sid. 27. S. C. 1 Lev. 54.

Debt upon bond of 300*l.*, conditioned, that if such ship sailed to Surat, in the East Indies, and returned safe to London, or if the owner and his goods returned safe, &c. then the defendant should pay to the plaintiff the principal sum of 3000*l.* and also 40*l.* for every 100*l.*; but if the ship should perish by any unavoidable casualty of the sea, fire, or enemies, to be proved by sufficient evidence, then the plaintiff was to have nothing. The question was, whether this was an usurious contract? Adjudged, that it was not, and that it was a good bottomry contract. Bridgman, Ch. J. distinguished between a bargain and a loan; for where the bargain is plain, and the principal is in hazard, it cannot be said to be within the statute of usury; but it is otherwise of a loan, where it is intended that the principal shall not be in hazard; and adjudged *pro lot Cur.* for the plaintiff, that this contract is not usurious. See Dandy v. Turner, 1 Eq. Ca. Abr. 312; 4 Com. Dig. 193; 2 Ves. 146; 1 Vern. 263.

5. PAXTON V. POPHAM. E. T. 1808. K. B. 9 East. 408.

The condition of the bond stated that the defendant had taken up, borrowed, shall be safely performed, which agreement is sometimes called *foenus nauticum* or *usura maritima*. But the legislature has, by the 19 Geo. 2. c. 37. s. 5. made such a contract void.

The master of a vessel carrying a cargo or freight may in a foreign port hypothecate that cargo for the repairing damages sustained by the ship at sea, such repairs being absolutely necessary, for the purpose of delivering the cargo according to the charter party. The *Gratitudino*, Rob. Adm. 242; see 1 Salk. 341,

But such rule is confined to *bona fide* bonds; therefore proof that the bond was given to secure the price of goods, and [659] not as a *respondentia* bond, is admissible.

and received of the plaintiff, a sum of money, which was to run at *respondentia* interest, on the security of certain goods shipped from Calcutta to Ostend. The defendants pleaded, that the bond was given to cover the price of goods sold by the plaintiffs to the defendants, for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer to this plea, it was urged in support of this demurrer, that the matter in the plea being directly inconsistent with the matter stated in the condition, it ought to have been averred in the plea that the statement in the condition was merely colourable; but the Court overruled the objection, and held the plea to be good, Lord Ellenborough, C. J. observing, that upon the adjustment of the account, after the goods were sold, the parties might have calculated upon the debt as a loan upon that amount, and therefore there was not any necessary inconsistency between the two statements, even taking the case upon the strict rule of law. as it had been generally considered before the case of *Collins v. Blantern*, 2 Wils. 347; but since that case there could not be any doubt upon it. And Le Blanc, J. observed, that after the cases, breaking in upon the old rule, have determined, that though the bond state nothing illegal upon the face of it, the obligor may show by his plea that it was given for an illegal consideration, different from the consideration stated in the condition; and when the plea states, that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed; and it shows that the statement in the condition was made colourable, in order to cover the illegal agreement. See ante, tit. Bond.

6. *JOYCE v. WILLIAMSON*. M. T. 1749. K. B. Cited 2 Park on Insurance, 563

In bottomry and *respondentia* bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss.*

Upon motion for a new trial, it appeared, that this was an action of debt upon a bottomry bond, the condition of which was, that upon the ship's safe arrival at New York a certain sum of money should be paid to the plaintiff; but that, in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas; 1st, *non est factum*; 2dly, that the ship did not arrive at New-York, the port of destination; 3dly, that the ship was captured. Upon the two first pleas issue was joined; and to the last there was a replication of re-capture. The facts, which appeared in evidence on the trial, are these; the ship was taken before her arrival at New York by two American privateers, which detained her for one month, and plundered her of her stores, at which time she was retaken by an English privateer, and carried into Halifax. The Admiralty Court adjudged her to be a good prize to the English privateer, and decreed that she should be restored to the original owners, on paying one-eighth for salvage; that she proceeded with the remainder of her cargo to New York, and earned her freight; that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that by the law of England there is neither average or salvage upon a bottomry bond. It was indeed contended at the bar on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by capture, &c., the bond should be void, and that here there was a capture and a detention for one month. But, upon consideration, we think that a capture within this condition does not mean a temporary capture, but it must be a total loss; now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship; but we are all of opinion that the verdict is right, and that the rule for a new trial must be discharged.

7. *WALPOLE v. EWER*. T. T. 1789. K. B. Cited 2 Park on Insurance, 565.

*It seems to have been at one time doubted, whether a loss by the aggressions of pirates fell within the words "perils at sea," for the point was argued in the King's Bench, in the reign of Jas. 2. but the Court were afterwards of opinion, that piracy was one of the dangers of the seas; *Barton v. Walliford*. Comb. 56.

This was an action on a policy of insurance upon a *respondentia* bond on ship and goods, at and from B. to C. The ship was Danish, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* per cent.; and the plaintiff, as holder of a *respondentia* bond, had been called upon to contribute, and now brought this action against the English underwriters for the amount of that contribution. Lord Kenyon, C. J. A lender upon *respondentia* is not liable to average losses, but is entitled to the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends, that as, by the laws of Denmark, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish consul has proved that he received a judgment of the Court of Copenhagen, the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side; but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country to which the contract relates.—Verdict for the plaintiff.

8. *NEWMAN V. CAZALET*. H. T. Cited 2 Park on Insurance.

This was an action on a policy, upon a cargo of fish from Newfoundland to any port of Spain, Portugal, or Italy. The ship met with bad weather, and put into Alicant and Leghorn to repair. The captain being owner, presented a petition to the commercial court of Pisa, to adjust the general average, as he had put in for the general benefit of all concerned. The Court, according to its usual course. (which appears to be a very extraordinary one), adjusted the loss by charging the cargo at its full value, but the ship at only one half, and the freight at one third; and they also charged as a part of the general average, the seamen's wages and provisions while in port. The defendant, as underwriter, had paid into court as much as would cover the average, if adjusted according to the memorandum in the policy, and the law and usage in England. The question was, whether the plaintiff having been compelled to pay beyond that sum, according to the calculation of the sentence of the Court of Pisa, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said that in repeated instances they had adjusted averages under similar sentences of the Court of Pisa; and the underwriters, though with reluctance, had always paid them. Mr. Justice Buller. On the general law the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of English law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken.—The plaintiff had a verdict accordingly.

9. *WESTERN V. WILDY*. H. T. 1683. K. B. Skin. 152.

The plaintiff lent 500*l.* upon the hull of a ship, and defendant covenanted to pay if the ship went from London to Bantam, and returned from thence directly to London within 12 months, 550*l.*; if from London to Bantam, and from thence to China or Formosa, and returned from London within 24 months, then to pay 5*l.* per month above 650*l.* till 36 months; and if she returned within 36 months, then to pay 710*l.* unless it can be proved by Wildy (the defendant) that the ship returned not, but was lost within 36 months. The ship went from London to Bantam, and from thence to Surat and other parts, deviation.

* By the 16 Car. 11 s. 2. made perpetual by 22 & 23 Car. 2 c. 11. s. 12. reciting that masters and mariners of ships having insured or taken upon bottomry greater sums of money than the value of their adventure, do wilfully cast away, burn, or otherwise destroy the ships under their charge, to the merchants and owner's great loss for the prevention thereof for the future, it is enacted that if any captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongs, or procure the same to be done, he shall suffer death as a felon.

and so returned to Bantam; and in her voyage from Bantam to London was lost within 36 months. These facts, upon which the present action was brought, appeared upon demurrer. The Court inclined to be of opinion, that the ship having deviated from the voyage described, in going to Surat, plaintiff was not to bear the loss, and was consequently entitled to recover; they, however, took time to deliberate, and after consideration gave judgment for the plaintiff.

10. WILLIAMS V. STEADMAN. E. T. 1692. K. B. Skin. 345; S. C. Holt 126.

Though the deviation must clearly appear on the pleadings, and cannot be taken by implication.

In an action of debt upon a bottomry bond, the defendant pleaded that the ship went from London to Barbadoes, *sine deviatione*, and afterwards she returned from Barbadoes towards London, and in her return was lost in *voyageo predicto*; the plaintiff replied, that the ship in her return went from Barbadoes to Jamaica, and that after a stay there she returned from Jamaica towards London, and was lost; and so shows a deviation; the defendant rejoined that she was pressed into the king's service, and so was compelled to go to Jamaica, which is the deviation pleaded by the plaintiff, without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from London to Barbadoes, without deviation, and that in the return she was lost in the voyage aforesaid; but it does not show without deviation. Now the condition is so in express words, and he ought to show expressly that he has performed the words of the condition. See 1 Eq. Ca. Abr. 372; S. C. 2 Ch. Cases, 130.

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11. GLOVER V. BLACK. T. T. 1763. K. B. 3 Burr. 1394; S. C. 1 Blac. 396.

A person having a *respondentia* interest, cannot insure it as an interest on goods.

This was an action on the case upon a policy of insurance, made on goods and merchandise loaden or to be loaden on board the good ship or vessel called the Denham, whereof was master William Tryon, "at and from Bengal to any ports or places whatsoever in the East Indies, until her safe arrival in London;" which policy was underwritten 'by the defendant for 200l. for a premium of 10l., per cent. The plaintiff declared for a total loss. The case was as follows; Before the underwriting of the policy, the plaintiff had lent to captain Tryon, the master of the ship, upon the goods then loaden and to be loaden on board the said ship on account of the said William Tryon, the sum of 794l. at *respondentia*; for which *respondentia* bond was executed by captain Tryon and one Joseph Bustoll to the plaintiff in the common form. On the 31st of March, 1760, the ship was within the limits insured; and had then and at the time of the loss, divers goods and merchandizes on board her which were the property of the said captain Tryon, and of greater value than all the money he had borrowed. On the said 31st of March, 1760, the said ship with her lading on board her, was burnt, and thereby all the goods and merchandize aforesaid of the said William Tryon were totally consumed and lost. On this proof the jury found a verdict for the plaintiff, subject to the opinion of the Court, "whether on this evidence the plaintiff was entitled to recover on this policy?" The stat. 19 G. 2. c. 37. s. 5. enacts, "that the lender of money on bottomry or at *respondentia*, his agents or assigns, shall have right to make assurance on the money so lent. And counsel for the plaintiff insisted that the lender of this money had an interest in the goods, though they were the property of the borrower. And as *respondentia* was an interest that might be insured under the stat. it was not necessary to specify in the policy, "that it was *respondentia* interest only, which was insured." The Court took sometime to think of this case. And afterward Lord Mansfield C. J. delivered their resolution. He owned that at the trial, and also since upon the argument here, he did lean to support this insurance; and that the doubt which had arisen upon it was only occasioned by a slip in omitting to specify (as it was intended to have been done) "That this was a *respondentia* interest." The ground of supporting this insurance, if it could have been supported, was a clause of the act of 19 G. 2. c. 37. viz. the 5th section. Now this act, to the purpose of insurance, considers the borrower as having a right to insure only for the surplus value, over and above the money he has

borrowed on bottomry or at respondentia. And lenders at respondentia or on bottomry may, to many purposes, be said to have a lien. Yet we are all very well satisfied, after a more particular consideration, that this act of parliament never meant or intended to make any alteration in the manner of insurances [663]

Its view was to prevent gaming or wagering policies, where the insurer had no interest at all. And if the lender of money at *respondentia* was to be at liberty to insure for more than his whole interest, it would be a gaming policy; for it is obvious, that if he could insure his *respondentia* interest besides, this would amount to an insurance beyond the whole interest. The act considers the form of the policies just as they stood before the making of it; and provides, s. 6. that on all actions brought on policies of assurance, the plaintiff or his attorney or agent, shall, within 15 days after he shall be required by the defendant, or his attorney or agent, declare in writing, "what sum or sums he hath assured or caused to be assured in the whole, and what sum he hath borrowed at *respondentia* or bottomry for the voyage or any part of the voyage in question in such suit or action." And in describing *respondentia* interest, it gives the lender alone a right to make insurance on the money lent. So that this act left it upon the practice. His lordship said he had looked into the practice; and he found that bottomry and *respondentia* are a particular species of insurance in themselves, and have taken a particular denomination; and he could not find even a dictum in any writer, foreign or domestic, "that the *respondentia* creditor may insure upon the goods as goods., And in this very case, the *respondentia* interest was intended to have been specified; but was omitted to be so by mistake. He declared that he found by talking with intelligent persons very conversant in the knowledge and practice of insurances, "that they always do mention *respondentia* interest whenever they mean to insure it." It might be greatly inconvenient to introduce a practice contrary to general usage. And there may be some opening to fraud if it be not specified. He declared the ground of the present resolution to be this—"That it is established now as the law and practice of merchants that *respondentia* and bottomry must be mentioned and specified in the policy of insurance." But he declared, at the same time, that they did not mean to determine generally, "that no special interest in goods may be given in evidence, in other cases than those of *respondentia* and bottomry, if the circumstances of the case shall admit of it."—Plaintiff nonsuited.

12. THOMPSON V. THE ROYAL EXCHANGE ASSURANCE. *K. T. 1813. K. B. 1 M. & S. 30.*

This was an action against the underwriter of a bottomry bond. It appeared that during the voyage, the ship, from the tempestuous state of the weather, becoming disabled, was towed into harbour by a king's ship with which she fell in; that from the survey made of the ship she was then found incapable of continuing her voyage, or of remaining any longer in existence as a ship, without incurring expenses which would greatly exceed her value; that from necessity she was broken up, and that her hull, sails, and stores were there disposed of for much less than their original value. From these circumstances it was urged, that the condition upon which the sum borrowed was made payable had failed, and that therefore this action was maintainable. But the Court observed, that nothing short of a total destruction of the ship would constitute an utter loss. And that as in the case before them the thing continued to exist as a ship, her hull and bottom remaining, though perhaps in such a state as might make it prudent for the owners to dispose of her, the plaintiff could not be allowed to recover against the insurer. [664]

13. DA COSTA V. NEWHAM. *E. T. 1788. K. B. 2 T. R. 407.*

On a motion for a new trial in action against underwriters, it appeared that the ship insured met with an accident in the course of her voyage, and was obliged to put into a place called N. to repair. This was communicated to the plaintiff, the owner, who informed the underwriters of the fact; and also expressed his desire to abandon; the underwriters, however, insisted upon the vessel being repaired, and informed the plaintiff that they would pay the trades- And to enable an assured on bottomry to recover, the ship must have been actually lost. But where underwriters desire that a ship, which the assured is entitled to abandon, may be repaired at their expense, whereupon money for

repairs is taken upon a bottomry bond; to discharge which, the underwriters having refused to pay it, the ship is afterwards sold; they are liable for whatever loss the insured may sustain in consequence of such refusal.

men's bills, to which the plaintiff consented, but refused to advance the money thereupon it became necessary to take up a large sum on a bottomry bond. The ship was refitted, resumed her voyage, and gained freight afterwards. When she arrived at her port of destination, the underwriters refused to discharge the *respondentia bond*, and consequently the vessel was sold in order to satisfy the debt, so that she never was in the possession of the plaintiff again. Under these circumstances, the judge who tried the cause, said; the question was, whether the underwriters should be liable for the full amount of the insurance, or the amount of the bottomry only; however, the ship never came free into the plaintiff's hands; for, in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold; and, therefore, as for all the subsequent injury which had accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damaged to the whole amount of the insurance, the underwriters were liable, because it was their own fault in not taking up the bond for the expenses of those repairs, which had been incurred under their own express direction. The jury found a verdict accordingly; and, after argument, the Court said that the judge's direction was right; and that the jury were warranted, under the circumstances, in finding that the repairs had been undertaken at the risk of the underwriters, and that they were answerable for all subsequent losses.—Rule refused.

Bound Bailiff. See *tit. Arrest Sheriff*.

Boundaries.* See *tit. Hearsay Evidence; Inclosure; Perambulations*.
 1. NICHOLLS v. PARKER. Summer Assizes, 1806. K. B. 14 East. 331. THE KING v. THE INHABITANTS OF HAMMERSMITH. H. T. 1776. K. R. Peake's Ev. Appendix, 33. DOWN v. HOLE. 1795. C. P. Cited 11 East. 331. IRELAND v. POWELL. 1802. C. P. Peake's Ev. Appendix, 13.

Hearsay evidence is admissible on a question of parochial or manorial boundary, although the persons who had been heard [665] to speak of the boundary were parishioners and claimed a right of common over the very wastes which their declarations had a tendency to enlarge, there being no litigation then pending.

A question arose as to what was the boundary between the parishes of A. and B. or in other words, whether the common of C. was within the parish of A. or B. Evidence was admitted by Le Blanc, J. of what old persons, when alive, had said concerning the boundaries, though not as to particular facts or transactions; and this, though the old persons were parishioners, and claimed rights of common on the waste, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending.

* Are the utmost limit of land, whereby the same is known and ascertained; 4 Inst. 318; Courts of equity will grant commissions to ascertain boundaries; 1 Man. Chan. Prac. 80. In such a bill it must be clearly shown, that without the assistance of the Court they cannot be found; and a foundation must be laid for this relief, by showing, not merely that they are confused, but that the confusion has arisen from some misconduct of the defendant, or of those under whom he claims, of which the party has a right to complain, and which renders it incumbent on the defendant to co-operate with him in re-establishing them. Where it arose out of the unity of possession by the plaintiff's own tenants, and before the land came into the defendant's possession, and nothing was stated in the bill but the mere fact of confusion, the Court refused to interfere: 4 J. & W. 484. So the Court refused to grant a commission, to ascertain the boundaries of two rectories; 3 Anst. 801. And also refused a commission to settle the boundaries of a parish, or of a manor, where all parties who might probably be interested were not before the Court; 2 Anst. 386; id. 592.

On a commission granted to a prebendary to ascertain boundaries against his lessees, who were also owners of freehold, &c. within his prebend manor, it was holden that *quoad* the prebendal rights they constituted but one person, and he was therefore entitled to name as many commissioners as his lessees; 1 Swanst 9. A commission was granted by consent to ascertain prebendal lands, become mixed with other freehold lands of the tenant by unity of possession, and to set out other lands where they could not be distinguished and ascertained; 2 Mer. 509. In wastes where there are no boundaries, the boundaries are annually settled by a line drawn by the eye, from one spot to another visible object; 5 Dow. 273.

† And in general on questions upon a boundary or a customary right, or parochial or manorial customs; 1 T. R. 466. 5 T. R. 26; 3 Guil. 854; S. C. 2. Ves. 512; 12 East. 62; 1 M. & S. 679; 1 Wightw. 112; declarations as to the common opinion of the place, made by deceased persons, who from their situation had the means of knowledge, and no interest to misrepresent, have been generally considered admissible evidence; declarations of deceased persons as to boundaries or customs, &c. ought to come from persons who had

2 CLOTHIER v. CHAPMAN. Summer Assizes, 1805. K. B. 14 East. 331.

The defendant in this case offered in evidence, the declarations of old persons, deceased, as to the ancient boundary of a waste, belonging to a certain farm; but Graham B. rejected the evidence, and distinguished between the admission of evidence, where the question was as to the boundaries of a parish or manor, and as to the boundary between one private property and another.

But evidence of reputation of a boundary between two private proprietors will be rejected.

Bowls.* See *post*, tit. *Gaming*.

REX v. CLARKE. E. T. 1774. K. B. Cowp. 35.

This was a conviction upon statute 33 Hen. 8. c. 9. s. 16. in effect as follows—"Be it remembered that on, &c. S. P. and S. B. of &c. came before me W. C. one, &c. and gave me to understand and be informed that T. C. of, &c. labourer, on, &c. did use and play at a certain unlawful game with bowls and pins, called bowlrushing, with divers liege subjects of our said lord the king, and did then and there obtain and receive divers sums of money of the said subjects playing at the said game, against the form of the statutes in that case, &c. and against the peace, &c. and prayed that the said T. C. might be convicted of the said offence. Whereupon afterwards, on, &c. the said T. C. being apprehended and brought before me, &c. to answer to the said charge, &c. the said T. C. is asked by me, if he can say any thing for himself, why he, the said T. C. should not be convicted of the premises above charged upon him, &c. and thereupon the said T. C. of his own accord fully acknowledging the premises, &c. to be true as charged, does not show to me any sufficient cause why he should not be convicted thereof. Whereupon all and singular the premises, &c. being considered, and due deliberation being thereunto had, I do adjudge and determine that the said T. C. is guilty of the premises, &c. and that the said T. C. is therefore an idle and disorderly person, and is also therefore a rogue and vagabond, within the true intent and meaning of the statutes in that case made and provided. And the said T. C. is accordingly by me convicted of the offence charged upon him in and by the said information, and of being an idle and disorderly person, and a rogue and vagabond, in form aforesaid. And I do hereby adjudge and order that said T. C. be therefore committed to the house of correction, there to remain for the space of one month, being a less time than until the next quarter sessions of the peace, or until the said T. C. shall find sufficient sureties to be bound in recognizance to appear before the next quarter sessions, and for his good behaviour in the mean time. *Per Cur* This conviction is a jumble and confusion of charges and punishments. It is a conviction for playing at bowls, and the punishment inflicted is imprisonment as being an idle and disorderly person. The statute 33 H. 8. c. 9. sec. 16. lays a penalty of 20s. on every labourer, &c. playing at bowls out of Christmas. The punishment, therefore is clearly not under this statute. The statute 17 Geo. 2. c. 5. sec. 2. describes four kinds of idle and disorderly persons; and being an explanatory act, we cannot go out of it. Now bowling is not an offence within any of these descriptions; consequently the defendant is not punishable as an idle and disorderly person; but the punishment is under this latter statute. Therefore, we are all clearly of opinion, that the conviction ought to be quashed.

A party convicted of playing at bowls under the 33 Hen. 8. c. 9. is not punishable as a disorderly person with in the 17 Geo. 2. c. 5.

Boxkeeper.

ASHLEY v. HARRISON. M. T. 1793. K. B. N. P. 1 Esp. 49.

Action against the defendant for publishing a false and scandalous libel of a certain performer, whereby the public did not attend the theatre, from an apprehension that the performance would not be suffered to proceed. To prove the loss, the boxkeeper stated, that in consequence of the performer declining to act after the libel had been published by the defendant, several parties gave up their boxes. It was objected that the witness was incompetent; and Lord no interest to misrepresent; if they appear to have had any interest to make evidence for themselves, or for others, what they said will not be evidence; see 1 Wightw. 112; *post*, tit. *Hearsay Evidence*.

To prove a loss by the giving up of boxes in a theatre, in consequence of a tortious act of the defendant.

* This is a gaming within the stat. 9 Anne. c. 14. s. 1.

the box-keeper is an incompetent witness.

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Kenyon, C. J. was of that opinion, observing that the parties themselves, who had given up their boxes, were the only persons competent, since they alone could state the motives which inclined them so to do.

Brawling.

This was an offence at common law, and is thus defined by the 5 & 6 Edw. 6. c. 4. s. 1. "If any person shall by words only, quarrel, chide, or brawl, in any church or churchyards, it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two (*sed vide* 1 Hagg. Rep. 181) lawful witnesses, to suspend every person so offending, if he be a layman, from the entrance of the church, and if he be a clerk, from the ministration of his office, for so long a time as the said ordinary shall think meet, according to the fault." Therefore a party may now proceed, either upon the stat. or on the ancient law. The Court will consider time and place in cases of "chiding, quarrelling, and brawling." That may be "chiding" or "brawling," in the church, which would not be so in the vestry. The vestry is a place for parish business, and the Court would not interfere further than might be necessary for the preservation of due order and decorum; 1 Hagg. Rep. 184-5. Suspension of a parishioner *ab ingressu ecclesiæ* prescribed by 5 & 6 Edw. 6. c. 4. was limited to a month only under certain circumstances; Clinton v. Hatchard, 1 Add. Rep. 96; and in another case, Canning v. Sawkins, 2 Phill. Rep. 293. for brawling in a chancel, to three weeks, with notification in the church of such suspension in the latter case, and costs in both. In Cox v. Gooday, 2 Hagg. Rep. 138. a clergyman was suspended for a fortnight for words spoken during divine service, by way of admonition of a passionate tenor, though expressed without any tone of passion. Costs were prayed, but the report does not notice whether they were granted. In Lage v. Alton, Cro. Jac. 462. a prohibition was prayed upon the statute, because that costs were given in the spiritual court; but it was denied by the Court, the costs being there for the expences of the suit; otherwise, if it had been for damages. This being a criminal proceeding, the office of the judge wrongly promoted, by *misnomer* of the judge in a copy of the articles for this offence, is fatal; 1 Hagg. 1. And *semble* the articles should be in his name as vicar general and official principal; 1 Hagg. 4. As to evidence of brawling, see 3 Phill. Rep. 120.

Breach, Assignment of.

See tits. Arbitration and Award, Articles of the Peace, Attorney, Bond, Condition, Contract, Covenant, Penalty, Replevin, Trust and Trustee.

Breach of the Peace. See tits. *Arrest*; *Articles of the Peace*.

Breach of Prison. See tit. *Escape*; *Prison*.

Breach of Promise of Marriage. See tit. *Marriage*.

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Breach of Trust. See tit. *Trust and Trustee*.

Bread.

See statutes 2 & 3 Edw. 6. c. 15; 31 Geo. 2. c. 29; 32 Geo. 2. c. 18; 3 Geo. 3. c. 11; 36 Geo. 3. c. 22; 37 Geo. 3. c. 98; 38 Geo. 3. c. 62; 39 & 40 Geo. 3. c. 74; 41 Geo. 3. c. 12; 53 Geo. 3. c. 116; 55 Geo. 3. c. 99. And the 1 & 2 Geo. 4. c. 50; and 3 Geo. 4. c. 106; repealing the earlier statutes, and making new provisions.

Breaking Open Doors. See tits. *Arrest*; *Trespass*.

Breaking Bulk. See tit. *Insurance*.

Brewer. See ante, tits. *Beer and Ale*.

THE ATTORNEY-GENERAL v. KING. M. T. 1817. Ex. 5 Price. 195.

The effect of the 51 G. 3. c. 87. is to prevent the trades of a brewer and distiller being car-

The 51 Geo. 3. c. 87. having enacted that no maker or makers of any liquor, nor any brewer or brewers of beer, shall receive or take into his, her, or their custody or possession any grains of *Paradise*, &c. and if any such maker or makers, or brewer or brewers, shall receive into his, her, or their custody or possession, any, &c. the same shall be forfeited, together with the casks, &c. containing the same; and all such, &c. shall and may be seized by an officer or officers of excise, and such maker or makers, or brewer or brewers, in whose custody or possession any such &c. shall be found, shall forfeit and lose the

sum of 200l. An information under this statute stated that the defendant, being a brewer, did after the passing of the above act, receive and take into his custody a quantity of *Paradise*, contrary, &c. and which *Paradise* was found in the custody and possession of the defendant, whereby, &c. After verdict for the crown, a motion was made for a new trial, on the ground that the defendants, although brewers, might be lawfully possessed of the article in question as rectifiers; or in other words that the two trades could be carried on by the same person at the same time. *Sed per Cur.* The 51 Geo. 3. is directed simply against brewers having this article in their possession; at the same time, it is clear that rectifiers of spirits may lawfully possess the ingredient; 26 Geo. 3. c. 73. One objection made for the defendant was, that being a rectifier as well as a brewer, he was entitled to have possession of these grains of *Paradise* as a rectifier, without rendering himself liable to the penalties of the act for possessing them in his character of brewer. We are clearly of opinion, that he would be equally liable to the penalties laid in the information to have been incurred by him for that offence, for the act makes no exception in favour of brewers who are also at the same time rectifiers, and the defendant is not less a brewer, because he happens also to be a distiller. The consequence must certainly be, that the two trades cannot be carried on together. But now let us consider the fact of a receiving and taking into possession, whether this case be within the meaning of the statute. Possession is, undoubtedly, *prima facie* evidence of a receipt and taking. So far, therefore, the case was made out; but then the defendant in answer to that, proved satisfactorily that he had received the cask into his possession a very considerable time before the act passed; in fact, it had been left on the premises by the defendant's predecessor in the business, where it remained open ever since unused. There could, therefore, be no fraud imputed, and the original possession was an innocent one. Then the question is, whether that being proved, there was before the Court, on the whole case, evidence to show that the defendant had received and taken these grains of *Paradise* into his possession after the act had passed so as to bring him within the penal clause. We think that the defendant cannot be brought within the meaning of the statute. On the contrary, it was originally delivered to his predecessor, and not to him; and we are then called on to say, whether his possession after the act passed is not a receipt of the thing after the act. It certainly seems to us to be impossible so to separate the acts of receipt and delivery, or to admit the idea of a receipt as unconnected with that of a delivery; consequently, as the word *received* cannot impart any thing but a receiving at the time of the delivery, and as this article was received in that sense of the word, before the passing of this act, the defendant cannot be considered as liable to the penalty. The receiving the article being a positive act, the mere possession of it cannot be considered as a new act of receiving committed by the defendant, so as to amount to an offence within the legislative enactment.—Verdict to be entered for defendant.

Brbery. See tit. *Offices, buying and selling of.*

I. ACTION FOR.

(A) AT THE ELECTION OF MEMBERS OF PARLIAMENT.

(a) *When sustainable.*

1. *Relative to an action for the penalties, and within what time to be brought, p. 670.*

2. *Relative to the discoverer, p. 673.*

(b) *Pleadings.*

1. *Declaration, p. 676*

2. *Pleas, p. 678,*

(c) *Evidence, p. 679* (d) *Witnesses, p. 683.* (e) *Of the damages, p. 685.*

(f) *Of staying proceedings on account of wilful delay, p. 686.*

II. INDICTMENT AND INFORMATION FOR.

(A) AT THE ELECTION OF MEMBERS OF PARLIAMENT, p. 686.

(B) AT THE ELECTION OF CORPORATE OFFICERS, p. 688.

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(C) AGAINST PERSONS FOR ATTEMPTING TO BRIBE.

- (a) *Public ministers*, p. 689. (b) *Judges*, p. 690. (c) *Jurymen*, p. 690.
 (d) *Officers of excise*, p. 690. (e) *Clerks to public offices*, p. 691.

I. ACTION FOR.

(A) AT THE ELECTION OF MEMBERS OF PARLIAMENT.

(a) *When sustainable.*

1. *Relative to an action for the penalties, and within what time to be brought.*

1. *SULSTON V. NORTON*. M. T. 1761. K. B. 3 Burr. 1235; S. C. 1 Blac. Rep. 317.

A declaration for bribery* on the 2d G. 2,† charging defendant with corrupting A. B. to vote for;

A declaration on the 2 Geo. 2. cap. 24. for bribery, charged the defendant with corrupting one M. to vote for Lord V. and Sir R. B. by giving him 5*l.* 5*s.* After a verdict for the plaintiff, a motion was made to set aside the verdict, on an objection, that the man did not in fact vote for the persons he promised to vote for, but on the contrary voted for their opponents, and therefore the defendant, as he did not by any corrupt agreement procure M. to vote for them, cannot be said to have corrupted him so to do. But the Court said, the objection was unavailable. How could there ever have been a doubt? The offence was completely committed by the corruptor, whether the other party did afterwards perform his promise, or break it.

* Bribery is the receiving or offering any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity; see 1 Hawk. P. C. c. 67. s. 1 and 2; 4 Blac. Com. 129; 3 Inst. 149.

† Chap. 24. s. 7. which enacts, that if any person who shall have a claim to have any right to vote in any election of any member to serve in parliament, shall ask, receive, or take any money, or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or refuse or forbear to give his vote in any such election, or if any person by himself or any person employed by him, shall by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person or persons to give his, her, or their vote or votes in any such election, such person so offending in any of the cases aforesaid, shall, for every such offence, forfeit 500*l.* And further, that such offender after judgment against him in any action or information, or summary action or prosecution, or benefit otherwise lawfully convicted thereof, shall forever be disabled to vote in any election of any member to serve parliament, and to hold any office or franchise, as if such person was naturally dead. Before the passing of that act, by 7 & 8 W. 3 c. 7. it was enacted, that if any person should make, or give any contract, promise bond or security, or any gift or reward, to procure a false or double return of any member to serve in parliament he should forfeit the sum of 800*l.* one third to the king, one third to the poor of the county, city, borough, or place concerned, the remaining third to the person who should sue for the same by action of debt, bill, plaint or information. But a recent statute 49 Geo. 3 c. 118. after reciting that the giving money, &c. in order to procure the return of a member to parliament, if not given to or for the use of some person having a right or claiming to have a right, to act as returning officer, or to vote at the election, is not bribery within the former statute; 2 Geo. 2. c. 24; enacts, that if any person shall give, or cause to be given, directly or indirectly, or promise, or agree to give, any money, gift or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf such gift or promise shall be made, shall by himself, or by any other at his request or command, procure or endeavour to procure, the return of any person to parliament for any place, he shall, if not returned himself, to parliament for such a place, for every such gift or promise forfeit 1000*l.*; and if returned and having given, or promised to give, or knowing of and consenting to such gifts or promises, shall be disabled and incapacitated to serve in that parliament for such place, and shall be as if he had never been returned or elected a member of parliament. And it enacts also that any person who shall receive or accept of, by himself or by any other, to his use, or on his behalf, any such money, gift or reward, or any promise upon any such engagement, contract or agreement; shall forfeit the value and amount of such money, gift or reward, over and above the sum of 500*l.*

By sect. 2. it is enacted, that if any person shall by himself, or by any other, give, or procure to be given, or promise to give, or procure to be given, any office, place, or employment, upon any express contract or agreement, that the person to whom or to whose use, or on whose behalf such gift or promise shall be made, shall by himself or by any other at his request or command, procure, or endeavour to procure, the return of any person

2. BUSH v. RALLING. T. T. 1756. K. B. Sayer. 289.

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This action was brought to recover the penalty given by the 7th section of the 2 Geo. 2. c. 24. The offence laid in the declaration was, that the defendant, while one R. T. was candidate for being a member of parliament for the borough of A. did corrupt one J. H. to *forbear to give his vote* for the said R. T. by giving the said J. H. the sum of 2l. 2s. The evidence was, that although in fact J. H. had received the money, that yet *he had voted for R. T.* and so intended to do when he received the money. It was objected, that the offence was not proved, so as to bring it within the statute, as stated in the declaration; for as J. H. had voted for R. T. the defendant *had not corrupted him to forbear for voting for him*, as it was laid in the declaration. But the Court held, that the intention of the voter could not alter the offence, nor was it necessary to complete it, that he should have *forborne to vote*; the offence was complete by giving the money to the voter to induce him to forbear from voting, and it could not be altered by the intention of the voter to vote or to forbear to vote.

Or forbear to vote for C. D. describes, in either case, an offence within the 2 Geo. 2. though the party bribed does not vote or forbear to vote according to the bribe.

3. EDWARDS v. EVANS. E. T. 1803. K. B. 3 East. 451.

This was an action on the 7th clause of the 2 Geo. 2. c. 24. against a voter for the borough of L. for asking one K. a candidate, for a sum of money for his vote. The fact was proved; but the defence set up was, that it was said in joke, and in ridicule of K.'s pretensions. The judge who tried the cause left it to the jury to say whether the request was seriously made by the defendant, with a view to accept it to influence his vote, as stated, or not. The jury found a verdict for the defendant, which the Court refused to set aside.

So asking for money from a candidate as a

[672] bribe is an offence, if it appears it was done with a serious intention on the part of the voter.

4. HUNTINGTOWER v. GARDNER. H. T. 1823. K. B. MS.; S. C. 1 B. & C. 297; S. C. 2 D. & R. 450.

Declaration, in debt. After stating the issuing of the writ, to elect two burgesses to serve in parliament for the borough of Ilchester, it set forth, that the defendant did receive a large sum of money for giving his vote for two of the candidates. There were other counts, that the defendant did agree to receive a sum of money to give his vote for such candidates as a particular person should name. Plea, general issue.

But where in such an action it appeared that the elector received the money after the election was over, and there was no proof of any prior agreement to accept it, the Court held that the case was not within the statute.

It appeared at the trial, that this was an action of debt for penalties on the 2 Geo. 2. c. 24. against bribery at election of members of parliament; and that the defendant, after the election for Ilchester, received 30l. for giving his vote; but it did not appear that it was in consequence of any prior agreement.

It was objected, on the part of the defendant, that the evidence did not support the declaration, because it was no offence to receive money for giving a vote, and that there was no proof of an agreement to give a vote. The judge who tried the cause over-ruled the first objection, and the jury found a verdict against the defendant on the counts charging him with having received a bribe for giving his vote.

On showing cause against a rule for entering a nonsuit, it was contended, that the statute was a remedial one as well as penal, and that, in consequence, it ought to receive a liberal construction, and then the words to give would embrace the two cases, of taking money before an election, and also for receiving it after the election was over. *Sed per Cur.* Laying aside technical objections, the broad question for the Court to consider is, whether, under the seventh section of 2 Geo. 2. c. 24. a person is liable to be sued for penalties, to parliament for any place, such person so returned, and so having given or procured to be given, or so promised to give or procure to be given, or knowing of and consenting to such gift or promise upon any such express contract or agreement, shall be disabled and incapacitated to serve in that parliament for such place, and be deemed no member of parliament, and as if he had never been returned; and any person who shall receive or accept of, by himself, or by any other to his use, or on his behalf, any such office, place, or employment, upon such express contract or agreement, shall forfeit such office, &c. and be incapacitated for holding the same, and shall forfeit 500l. And it further enacts, that any person holding any office under his majesty, who shall give such office, appointment, or place, upon any such express contract or agreement, that the person to whom, or for whose use such office, &c. shall have been given, shall so procure, or endeavour to procure, the return of any person to parliament, shall forfeit 1000l.

who, after an election is over, but not in consequence of any prior agreement, receives a sum of money for having given a vote at that election? We strongly feel the mischievous tendency of the practice of bribery, and, as far as it is in our power, we shall always endeavour to suppress it, but we must not permit our feelings to carry us beyond the law. If it is not strong enough to overpower this wicked practice, it is the province of the legislature to correct it. We must administer the laws as we find them. It has been said, that this is a remedial statute. It gives penalties, and, therefore, although it may give a remedy for an evil, yet it is not a remedy as to the party grieved, but it awards penalties as a punishment for the actions done. The statute, therefore, being a penal one, it must be strictly construed. Now, by the seventh section, it is enacted, that if any person shall take any reward whatsoever to give his vote, or to refuse or to *forbear* to give his vote, he shall be liable to penalties. These words are clearly prospective, and not retrospective, and mean that the person shall be liable to be punished if he receive a reward *in order* to give his vote. It seems as though the legislature had not provided for the circumstance of money being taken after the election where there is not a prior agreement to receive it, and the words *to forbear* cannot be retrospective. Other parts of the act favour this construction. The oath to be taken by the elector, is, that he will not receive any money *in order* to give his vote; and the clause, indemnifying a person who will discover another offender, exempts him only when he makes the discovery within 12 months *from the election*. It has been said, that the mischief is the same, whether the money is paid before or after the election; but it would seem that the legislature does not think so; if they do, they must alter the law. The present case does not fall within the spirit or the words of the act. It is possible that a man may give a conscientious vote, and yet, upon account of his poverty, honestly receive a sum of money for having done so. —Rule absolute.

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Prosecu-
tions under
the 2 Geo.
2. c. 24.
must be
within two
years,

Unless the
same be pre-
vented by
the offender
absconding

By the 2
G. 2. c. 24.
offenders
discovering
others with-
in twelve
months af-
ter the elec-
tion, shall
be indemni-
fied.

Making an
affidavit is
a sufficient
discovery
within the
meaning of
[674]
the act, if
a convic

The 11th section of the 2 Geo. 2. c. 24. relative to bribery at elections, provides that no person shall be liable to any incapacity, disability, forfeiture, or penalty, unless a prosecution be commenced within two years after the incapacity, &c. shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay.

And by 49 Geo. 3. c. 118. s. 4. it is enacted, that no person shall be liable to any forfeiture or penalty imposed by the act, unless some prosecution, action, or suit for the offence committed shall be actually and legally commenced against such person within two years next after the offence committed, and unless such person shall be arrested, summoned, or otherwise served with the writ or process, within the same space of time, so as such arrest, summons, or service, shall not be prevented by such person absconding, or withdrawing out of the jurisdiction of the Court, and in any prosecution, suit, or process, the same shall be proceeded in and carried on without any wilful delay.

2. Relative to the discoverer.

1. By section 8 of the 2 Geo. 2. c. 24. it is enacted, that if any person offending against the act, shall, within the space of 12 months next after such election, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act.

2. *SUTTON v. BISHOP.* H. T. 1769. K. B. 4 Burr. 2283; S. C. 1 Black. 665.

—This was an action of debt brought against Bishop, for the 500*l.* penalty, upon the 7th clause of the statute of 2 Geo. 2. c. 24. “for preventing bribery;” to which action the defendant had pleaded *nil debet*, and a verdict had been obtained against him by the plaintiff, but not fairly and regularly, as the defendant alleged, who therefore moved to set it aside. The case was in substance this: the defendant, Bishop, received a bribe of five guineas from one James Earle. He determined to discover Earle, in order to indemnify himself, pursuant to the 7th clause of this statute. Accordingly the now defend

ant, Bishop, made this discovery of Earle, upon the very day of the transaction, to one Gray, an attorney, who was a commissioner to take affidavits, and at the same time made affidavit of the fact before Gray. This was done upon the 16th of March, and an action was thereupon brought by one Bingley against this James Earle. The writ against Earle, at the suit of Bingley, was served upon Earle on the 19th of March. Two months after this the present action was brought by the present plaintiff, Sutton, against Bishop, the receiver of the bribe, who had two months before, made the above-mentioned discovery. The process against Bishop, at the suit of Sutton, was served upon Bishop on the 18th of May. Both these causes (of Bingley v. Earle, and Sutton v. Bishop) were set down for trial on the same day, and were actually tried within half an hour of each other; but the cause of Sutton v. Bishop standing first, and as first entered upon the judge's paper of causes, he would not invert the order in which they stood upon his paper, by trying the other cause (of Bingley v. Earle) first, though that action was first commenced. The consequence was that Sutton got a verdict against Bishop, for Bishop could not show that he had made a discovery of another person, so as to be thereupon convicted. Bingley on the other hand, got a verdict against Earle upon the evidence of Bishop, but this verdict came too late to avail Bishop in his own cause at the suit of Sutton, for a verdict had already been given against him which, as his counsel insisted, could not have happened if his cause had been tried first, as it ought to have been. On this matter two questions arose; 1st, whether the defendant, Bishop, was entitled to avail himself of the protection of the 8th clause of the act above recited; and, 2dly; in what mode he could avail himself of it, supposing him entitled to it.

The Court held, that in this case the defendant, Bishop, was to be deemed the discoverer. His application to Grey, and making an affidavit of the fact, was the first and original discovery. The action was brought thereupon against Earle, and Earle was convicted upon the evidence of Bishop. The other witnesses were only supporters of his discovery. The clause in question speaks of the discoverer in the singular number. The prosecutor could not be evidence for himself. If no one but the prosecutor could be considered as the discoverer, the clause would be ineffectual. They held, that the words "such persons so discovering, and not having been before that time convicted of any offence against this act," clearly relate to the time of the original discovery; and, therefore, Bishop's having been himself convicted before he gave evidence against Earle in the cause last tried, is no objection at all. They thought that Bishop was entitled to some relief, but in what mode he should receive it was not easy to determine. The verdict obtained against him could not be set aside for irregularity, because it was not irregular. There was no pretence to arrest the judgment, because nothing appears upon the face of the record to justify it; and the Court ought not to arrest judgments upon matters not appearing upon the face of the record, but are to judge upon the record itself. that their successors may know the grounds of their judgment. An *audita querela*, it was agreed, would be a proper method, and the most unexceptionable one, and was the old legal remedy; but as it had been long disused, and would be expensive, they chose to do it, if it might be so done, in a summary way, as being more easy and less expensive. At length they were of opinion that it might be done by a special rule, particularizing the circumstances of the case, and upon their staying the execution of Sutton's judgment against Bishop. This rule, they said, would be a record of the court, and the special reasons of making it would appear in it, and be upon record. For the present they discharged a rule at this time subsisting, "for staying the entering up the judgments in the respective cross causes;" but they made a rule, "that all proceedings upon both these judgments should be stayed till further order." And they proposed to make, afterwards, a special rule to the effect that has been above mentioned.

3. PUGH v. CURGENVEN. M. T. 1770. C. P. 3 Wils. 35.

In an action of debt to recover certain penalties against the defendant, upon

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But where a defendant had been convicted on the Bribery act, the Court refused to interfere, on the ground of his having convicted another by his evidence.

the stat. 2 Geo. 2. c. 24. for corrupting and procuring certain persons (voters) to give their votes in the election of members for the borough of Mitchell, in the county of Cornwall, the defendant pleaded *nil debet*. The cause was tried, and a verdict found for the plaintiff. It was afterwards moved, on the behalf of the defendant, that judgment upon the *postea* might be stayed, upon affidavits that the defendant did, within the space of 12 months next after the said election (by making an affidavit,) discover one Carey, who had offended against the said act, by receiving and taking money at the said election; who was convicted in an action at the suit of one Luke (as appears by the *postea* and judgment thereon now in court,) upon the single testimony of the now defendant, Curgenvén, who made the discovery, and swore he saw the bribe given to, and received, by, Carey, to give his vote at the said election. On showing cause against the rule, it was contended, that the Court ought not to interfere to determine this matter upon a motion, but leave Curgenvén to his remedy, if he had any, by an *audita querela*; and it was further insisted, that he ought to have pleaded the statute, and the matter of his discharge specially, that the plaintiff might have replied to it. *Per Cur.* We are all of opinion, that this is not a case wherein we ought to interfere at all upon a motion. If the defendant has the law on his side, he may take his remedy in some other way, as he shall be advised.—Rule discharged.

4. CURGENVEN V. CUMING. M. T. 1770. K. B. 4 Burr. 2504.

And it seems a plaintiff may be considered the discoverer, though he is not made by the act.

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In an action of debt brought upon the statute of 2 Geo. c. 24. against bribery at elections, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case. The defendant proved a copy of a judgment in the Court of C. P. between Cuming and one Sibley, by which judgment it appeared, that Cuming had obtained a judgment against Sibley for 1000l. upon the said statute of 2 Geo. 2. c. 24. against bribery at elections. The question was, whether the defendant, Cuming, is a discoverer in demised under the act of 2 Geo. 2. so as to be discharged from the penalties and disabilities incurred by the offences mentioned in the declaration in this cause. *Per Cur.* The Court have not said, nor would say, that a plaintiff cannot be the discoverer; but the act of parliament does not make him so, or consider him as the discoverer. Here is no evidence that the plaintiff was the discoverer; and another person must have been the witness, for the plaintiff could not be the witness himself. It is not to be presumed, without any evidence at all of it, that the plaintiff in the action was the discoverer; therefore the case is not completely stated. There ought to be a new trial.

(b) Pleadings in.

1. Declaration.

1. COOMER V. PITT. M. T. 1764. K. B. 5 Burr. 1586; S. C. 1 Blac. Rep. 523.

In an action on the 2 G. 2. it is not necessary to state in the declaration all the parties to vote for whom the bribe was accepted, or that those parties were candidates, or that the voters had a right to vote.

This was an action on the 2 Geo. 2. c. 24. for bribery, by corrupting three votes at the Ilchester election. After verdict for the plaintiff, with 1500l. damages, it was now moved, that the verdict might be entered up for the defendant; on three grounds; 1st, that the plaintiff had given no evidence to show that the persons bribed, or attempted to be bribed, had a right to vote at the time of the offence being committed; 2dly, that it did not appear, by any evidence given, that Lord E. who was charged to be a candidate, and for whom these persons were to give their votes, was then declared a candidate; and, 3dly, the charge was for bribing, or attempting to bribe them to vote for L. the Earl of E. by name, whereas the evidence went no further than to prove that the bribe was given, or offered, to induce them to vote for L. and his friend, generally, and without naming either Lord E. or any other friend in particular; so that there was variance between the charge in the declaration and the evidence brought in proof of it; and the evidence was not sufficient to support the charge. *Per Cur.* In penal actions the material fact must be charged; and, in fact, must be proved in such a manner, that all those consequences will follow a verdict which ought to attend it; but aggravations, and all circumstances that do not vary the offence, are out of the case, as to the neces-

nity of proving them. A man who has given money to another for his vote shall not be admitted to say that any other person had no right to vote. Here, however, it appears, that this person had a right to vote, and did vote. As to the second objection, candidate is a vague term; no certain idea is fixed by law to it; but L. was certainly a candidate; and this was a bribe to induce the voter to vote for him and his friend; and, as to the third, it is as untenable as the two former. The bribing to vote for one, or both, or either of these persons, is criminal within the act, and if proved, is sufficient; and here it was proved that the bribe was given to vote for L.—Rule discharged.

2. KING v. PIPPETT. E. T. 1786. K. B. 1 T. R. 235.

Debt for two penalties of 500*l.* each, upon 2 Geo. 2. for preventing bribery at elections of members of parliament. The declaration recited the writ to the sheriff for the election, and his precept to the portreeve of the borough, which concluded in these words, "and if the said election," &c. The precept, when produced, had not the word "if;" and Eyre, B. who tried the cause, being of opinion that there was a variance, and that the writ did not support the declaration, nonsuited the plaintiff. But on motion to set it aside, the Court were of opinion that the word "if" was nonsensical where it was introduced, and should be rejected as surplusage, since it did not vary the sense of the sentence; and as the declaration did not purport to set out a *ter-* nor, the variance might be rejected as surplusage, it not being necessary to set out the precept at all.

3. CUMING v. SIBLEY. E. T. 1769. C. P. Cited in KING v. PIPPETT. 1 T. R. 239.

The declaration stated the precept to have been directed to the *mayor only*; but when produced, it appeared to have been directed to the *mayor and burgesses*. On an objection being taken, it was reserved for the opinion of the Court, whether the precept produced as evidence supported the declaration; and the Court was of opinion that it did; for if it were the same in substance with that set forth in the declaration, it would be sufficient; the variance, to be material, must be a variance of the sense of something material.

4. SOLSTON v. NORTON. M. T. 1761. K. B. 3 Burr. 1235; S. C. 1 Elack. 317. In this case, the declaration contained five counts; and there was a verdict for the plaintiff, which he took on that which stated "that the defendant corrupted one M. to vote for V. by giving him 5*l.* 5*s.*" The evidence was, that the defendant did give M. 5*l.* 5*s.* to vote for V. and B.; and that M. gave him a note for that sum; but the defendant gave him a counter note, obliging himself to give up M.'s note, when the condition was performed. It was objected that the plaintiff could not have judgment on that count, on which he had only taken his verdict; that the act of parliament says, that if any one shall take any money or other reward by way of gift, loan, or other device, he shall forfeit, &c.; in order, therefore, to entitle the plaintiff to recover on this count, he must prove that the money was given to M. as a gift, whereas the evidence proved that it was a loan, and not a gift, and for which M. gave his note as a security. But the Court said, the evidence did support the count, for this is a gift. The note and all the rest is a mere evasion, colour, and device, to evade the law.

5. DAVY v. BAKER. M. T. 1770. K. B. 4 Burr. 2471.

In an action upon the statute of 2 Geo. 2. c. 24. s. 7. for preventing bribery, &c. upon *nil debet* being pleaded, a verdict was found for the plaintiff. A motion was made in arrest of judgment, on an objection that the charge was too loose and general; it being only "that the defendant did receive a gift or reward," without specifying what he received or took as a reward, whether money, or what particular species of reward.

Per Cur. This declaration is bad; and being upon a criminal charge, it ought to have been laid with sufficient certainty, so as to be pleadable in bar of another action. Criminal charges must be laid with certainty; and if they

* The averment of damages is unnecessary, since no damages are recoverable for the detention of the debt in an action for penalties; Cuming v. Sibley, 4 Burr. 2489. post, 685.

are not, exception may be taken in arrest of judgment after a verdict. The being after a verdict makes no difference, it is not too late. Judgment arrested.

2d. Pleas.

SIBLEY v. CUMING. M. T. 1769. K. B. 4 Burr. 2464.

Semb. that in an action for bribery, on the 2 Geo. 2. an offender *discovering* bribery may insist on that defence under the plea of *nil debet*. To an action of debt on the 2 Geo. 2. c. 24. for preventing bribery, the defendant pleaded *nil debet*. On the trial, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case. The defendant produced a copy of a judgment in the C. P. of a cause between one Cuming and one Sibley, by which it appeared that the defendant was convicted for bribing R. B. and J. C. R. B. gave evidence that he was a witness for the plaintiff in the cause of Cuming and Sibley, and proved at the trial that Sibley gave 3l. 3s. for his vote; and further gave evidence in this cause, that Cuming's servant came to him on, &c. and desired him to come to his master's house; that before that time he had made no discovery of the bribery. That one P., an attorney, examined him about it, and he made an affidavit of the said bribery; but he did not then see Cuming. P., the attorney, stated that he was a commissioner for taking affidavits both in the C. P. and K. B.; that on, &c. he received a letter from Cuming desiring him to come to his house, and he went accordingly; that Cuming then desired him to state the affidavits of several persons, among others, R. B. and J. C. with regard to the bribery money distributed by Sibley to the voters at T., at the last election; that he accordingly took the affidavits, for the purpose, as he believed, of settling the declaration in the said cause of Cuming v. Sibley. The question was, whether Cuming was a discoverer under the 2 Geo. 2. c. 24. s. 8. so as to be discharged from the penalties and disabilities incurred by the offences mentioned in the declaration in this cause. On behalf of the plaintiff, it was objected, 1st, that this matter ought not to have been admitted to be given in evidence; it ought to have been pleaded; and 2d, that the defendant was not a discoverer. *Per Cur.* As to the first point, we give no determinate opinion; but we think that this was not matter of substance necessary to be specially pleaded. It seems to be rather matter of inducement; and where it is matter of inducement, it may be given in evidence upon the general issue, though not where it is matter of substance. Now, this seems to be to us more of the nature of inducement; and we think the defendant is no object of this law. A proviso in the same act of parliament, and the matter provided in it, may be given in evidence on the general issue. Here is a proviso in the act 2. Geo. 2. which in effect says, that a person who has been a discoverer, shall not be an object of this law. The defendant has pleaded *nil debet*. The judgment will relate back to the time of the discovery. The defendant maintains the issue by showing that he does not owe the money. We think that the discoverer is not an object of this act. As to the second point, we are of opinion that the defendant *here* cannot be considered as the discoverer, he has indeed shown that he was not, but that R. B. was, for he could not have known what was the fact, unless R. B. had discovered it.—*Postea* to the plaintiff.

(c) *Evidence.*

1. RIGG v. CURGENVEN. H. T. 1769. C. P. 2 Wils. 395.

In an action for bribery, it is not necessary to prove that the parties bribed had a right to vote.

This was an action upon the statute against bribery; there was verdict for the plaintiff, subject to the opinion of the Court, upon an objection taken by the defendant that the averment or allegation in the declaration "that the person corrupted had a right to vote," had not been substantiated by the evidence. *Per Cur.* We are of opinion that it is not necessary in this case to allege in the declaration, or to prove, that the parties bribed had a right to vote; that the giving money to a man for his vote, and the standing by the presiding officer at the election, and giving his vote, which is received and not objected to, or controverted, is conclusive evidence against the defendant, and that, as against him, it is the most decisive and best evidence that can be;

* See ante, sect. 8. of the 2 Geo. 2. c. 24.

the case of *Coombe v. Pitt*, *ante*, p. 676, governs this case. As to the point mentioned of criminal conversation; to be sure, if a defendant say in jest, or in loose rambling talk, that he had lain with the plaintiff's wife, that would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously or solemnly recognised that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving the marriage. We think that the proof that these two persons voted at the election, and their votes not then disputed, or controverted, is evidence of their having a right to vote, proper to be left to a jury; although it be not conclusive evidence of their right to vote.—Judgment for the plaintiff.

2. *GREY v. SMITHES*. H. T. 1769. K. B. 4 Burr. 2273.

This was an action for bribery; the declaration stated the writ for the election, and the delivery of it to the sheriff; and that the sheriff, by virtue of it, ^{Nor need the time of} made a precept to the mayor of Colchester, who was the returning officer of ^{it, delivering} the borough, and delivered it to him; and that the mayor indorsed the day of the precept ^[680] his receipt thereof in his presence; and forthwith caused public notice to be ^{to the re-} given of the time and place of election; and proceeded to election thereupon ^{turning offi-} within four days after his receipt of the precept, &c. On the precept being ^{cer be prov-} produced, it appeared, that it was delivered to the mayor, in the presence of ^{ed in an ac-} two subscribing witnesses, who attested such delivery of it to him; but this a third per- ^{tion against} son proof was not offered to be made by either of themselves, but by a third person ^{son for bri-} for bribery at an election. ^{bery at an} The objection to this evidence was "that the proof offered, of his delivery of the precept to the mayor, was not by the evidence of either of the two subscribing witnesses, but by another person." And upon this objection the plaintiff was nonsuited. Afterwards, on motion for a new trial, the Court took time to advise, Lord Mansfield, C. J. observing that the attestation of the witnesses related to the time of the precepts being delivered to the returning officer, and that it was unnecessary to prove the time of such delivery in the case before the Court. He afterwards delivered the opinion of the Court. The latter part of Mr. Justice Bathurst's report, before whom the cause was tried, was, "that as neither of the persons who attested the indorsement of the day the mayor received it was called, he thought there should be a nonsuit against the plaintiff." Upon this, the counsel acquiesced, and proceeded no farther. The question was, "whether the delivery of the precept to the mayor was necessary to be authenticated by the witnesses who had subscribed their names in attestation of such delivery?" We all think, that if it had been the case of the mayor himself, such an attestation of the time of the delivery of the precept to him, and of his indorsing it in the presence of the person who delivered it to him, might be material; and the rule, "of the instrumental witnesses being the proper witnesses to prove a fact which they have attested (as being the best and properest)," may hold, as far as relates to the defence of the mayor himself, in case of his being put to justify his own conduct. But the present case is not the case of the mayor himself; it is on a collateral question, and concerns a third person, to whom the indorsement made by the mayor is immaterial. The clause in the act of 7 & 8 W. 3. c. 25. which was passed, *inter alia*, for preventing irregular proceedings of sheriffs and other officers at elections, inflicts a penalty on the mayor's omitting to indorse the day of receiving the precept; and it is material to him. But this third person cannot know when it was indorsed, how it was indorsed, or when it was attested. Therefore this difficulty of proving these circumstances ought not to be laid on a third person. A proof of the corporation's right to choose members; and of the precept's issuing, as declared upon; and of the delivery of it to the returning officer; and of the going to an election thereupon; might be enough for the plaintiff in this action to make; and it does not appear that he would have been deficient in making all proper proof. But all further proof that he could have made, was stopped by this opinion of the judge, holding the necessity of proving this delivery of the precept to the mayor, by the instrumental witnesses who attested the delivery, or by one of them; therefore

fore we are of opinion that the nonsuit was incorrect, and there ought to be a new trial.

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The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation in a declaration that such a precept issued, &c.

Parol evidence can not be admitted to vitiate the precept, though it is admissible to prove it right.

3. MEAD v. ROBINSON. M. T. 1743. C. P. Willes. 422.

This was a special case reserved at the trial on a point of evidence. On behalf of the plaintiff the under-sheriff produced the precept itself mentioned in the declaration, under the sheriff's official seal, signed and returned by the mayor to the sheriff, together with the indenture, which indenture, without the precept, was returned with the writ by the sheriff, the under-sheriff proving the practice there to be not to return the precept, along with the indenture. It was objected, on the part of the defendant, that the precept, together with the indenture, ought to have been returned, and filed in Chancery, and that a copy of the precept on record ought to have been produced.

But the Court said, it was not laid in the declaration that the precept was returned, but only that such precept issued; and therefore they were of opinion that the evidence produced was sufficient, and that there was no occasion to show it was returned; and likewise that the original was better evidence than the copy.—*Postea* to the plaintiff.

4. DICKSON v. FISHER. M. T. 1769. K. B. 4 Burr. 2267; S. C. 1 Blac. 664.

In an action for bribery at the election for Colchester, there was a verdict for the plaintiff on this special case. The precept had been directed to the mayor and commonalty of Colchester; but the words [and commonalty] were struck through with a pen, and the plaintiff gave it (that is the precept) in evidence disconnected, and separate from the writ and indenture of return; though it was originally annexed to, and returned with, the writ and indenture to the sheriff, but not filed with the same in the Crown-office; the defendant offered but was not permitted, to give parol evidence to prove that the words [and commonalty] were in the precept, and not obliterated when the same was delivered to the mayor, and returned by him. The questions stated for the opinions of the Court were, 1st; whether the instrument above stated, and given in evidence, proved the declaration; viz. that the precept issued, directed to the mayor of Colchester; 2dly, whether the above parol evidence ought to have been admitted for the defendant.

Per Cur. These precept ought to be directed to the returning officer; the plaintiff searches the offices, and finds it, with this alteration, or correction; these words were put in by mistake; they are, therefore, struck out; they would be surplusage if they stood there; it is the same as if they had never been in; being found in the proper office thus obliterated, it shall be intended to have been always right, and therefore proved the declaration; as to the second point, we held that parol evidence ought not to be admitted to vitiate the record, and prove it to have been admitted in order to prove it right.—*Postea* to the plaintiff.

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A copy of the poll taken at an election, examined with the original, and signed by the returning officer, is evidence in an action for bribery. And in such an action, an unstamped paper, purporting to be a promissory

5. MEAD v. ROBINSON. M. T. 1743. C. P. Willes. 422.

On motion for a new trial in action for bribery, it was objected, that the judge who tried the cause permitted a copy of the poll to be given in evidence, though the mayor had the original there, who was served with a subpoena *duces tecum*, and was ready to have produced the poll.

Sed per Cur. The poll given in evidence was properly received; for that, as it was signed by the mayor, it might be considered as an original; 2 Stra. 1048; or, if it were only an examined copy, it was admissible in evidence as such, on the same ground as copies of books of a public nature, and that person's even parol evidence of voting was admissible; the case of *Rex. v. Hughes*, H. T. 1 Geo. 2 K. B. M. S. in which, after great debate, the copy of the poll of the election of a mayor was holden to be good evidence, is an authority in our favour.

6. DOVER v. MAESTAKER. M. T. 1803. K. B. N. P. 5 Esp. 92.

In an action of debt for bribery at an election, under the 2 Geo. 2. c. 24. s. 7., Lord Ellenborough, C. J. held, that an unstamped promissory note payable to the defendant, which a witness said he had given for the re-payment of money received by him, as a voter, from the defendant (one of the candidates),

might be admitted as evidence of the transaction, to corroborate the testimony of the witness. note given by the voter, is evidence of the bribery.

7. HEWARD V. SHIPLEY. T. T. 1803. K. B. 4 East. 180.

The defendant in this case was sued upon the bribery act for taking a bribe for his vote for a member to serve in parliament, and a verdict found for the plaintiff. The verdict was occasioned by means of evidence given by a witness of the defendant's confession of it to the witness. Lawrence, J., before whom the cause had been tried, made use of the following observations upon a motion which was now made for a new trial; When this matter was first moved, I doubted whether I gave correct directions to the jury. As the defendant thought proper to confess that he was bribed, it was not made a question to the jury whether he spoke what was true, I thinking it would do no mischief to any other person, and that, if the defendant chose deliberately to make a confession, which confession was fairly given in evidence, whether it were correctly true or not, at least that he would have no reason to complain and that no others could complain. But on further consideration of the effect of such confession on the rights of others, although the defendant himself, against whom a verdict was given, could have no right to complain of it, I do not think that that was the correct way of viewing the case, because great difficulties may be thrown in the way of persons who may be plaintiffs against the witness, to get rid of the fraud, if it be such; and if the Court have reason to think this is a contrivance of the witness for the purpose of bringing forward that which is no bribe, on purpose to protect himself, the Court ought to remit it to another jury that it may be seen whether or no this man has stated what is true, or whether it is not all misrepresentation and contrivance, to answer the purpose of indemnity and protection against actions that may be brought against him. A verdict against a party who had been sued for bribery at an election having been recorded on the supposed confession of the voter, the Court seemed to think that there should be some evidence of bribery besides that of a mere confession, which might be collusive.

(d) *Witnesses.*

1. DOVER V. MAESTATER. M. T. 1803. K. B. N. P. 5 Esp. 92.

This was an action against a candidate, for corruptly bribing one J. S., a voter who was called as a witness to prove that he had received a reward for his vote. No objection being taken to his competency, Lord Ellenborough C. J. cautioned not to say any thing to criminate himself; for although the time for bringing an action against him for receiving a bribe had expired, yet he was subject to a criminal prosecution. In an action against a candidate for bribery, the voter,

2. MEAD V. ROBINSON. M. T. 1743. C. P. Willes. 422.

In an action for bribery, the declaration contained a count, charging the defendant with bribing J. B., by his agent P. W. To prove the bribery P. W. was called. On an objection to his competency, the Court said, 1st that two years had elapsed since the offences were committed; and therefore that witness could not be prosecuted under the act; and 2d, but even if the offence had been recently committed, P. W. could only be considered as an accomplice, and as such a competent witness. Or a person who has given a bribe to a voter as a competent witness.

3. EDWARDS V. EVANS. E. T. 1803. K. B. 3 East. 451.

In an action on the statute 5 Geo. 2. c. 24. for bribery at an election for members to serve in parliament, a witness who had been subpoenaed to prove a conversation that had taken place between the defendant and the other witness who it will be seen was called upon when examined on the *voir dire*, was rejected as incompetent, it appearing that a similar action was pending against him for bribery at the same election; and he having answered to the question put to him, whether, in case the defendant was convicted upon his testimony, and the action against himself was also prosecuted to conviction, he should avail himself of the indemnity given him, by the bribery act, as the first discoverer, that he should certainly, in such a case, avail himself of all legal advantages to protect himself. Another witness was called, who proved a conversation between him and the defendant, in which the defendant made a direct offer of giving him his vote for money. The defence set up was, that the offer was made jocularly, in ridicule of an individual, which it appeared was the fact, offering himself as a candidate at the election of a member to sit in by his evi- And it was at one time doubted, whether a person against whom an information for bribery was depending, and who acknowledged that if the defendant was convicted

dence, he would avail himself of that circumstance in evidence for his defence, was a good witness.

parliament, as the representative of a place to which he was a complete stranger, without paying any money to the voters, which he had disclaimed any intention of doing. A verdict was found for the defendant. A motion was now made for a new trial on the ground, that the above witness ought to have been examined, notwithstanding the pendency of the action for bribery against him, for that no interest was vested in him at that time, it being a contingency whether that action would be persevered in, and whether it would be prosecuted with effect; and till conviction, the witness must be presumed to be innocent; and that besides, it was contrary to the policy of the Bribery Act, to exclude the testimony of either of the parties to the bribery; for in general, these matters passed between the parties themselves, and it was meant to subject them both to the danger and penalty of such act, and to encourage them to impeach each other by offering an indemnity to the first discoverer. But the court here intimating, that if the question had turned merely on the objection to the witness on the point of interest, they should have thought it material enough to be considered more fully, upon a rule to show cause, observed that it became unnecessary to discuss that, for the defence had proceeded altogether upon a collateral fact to that which the rejected witness was called to confirm; viz. the conversation which took place between the other witness and defendant, which was admitted by defendant to have been truly stated; and they therefore refused the rule, although it was urged that it was impossible to calculate what effect the evidence of another witness to the same conversation might have had on the jury, or what other circumstances might have come out on his examination, which would have impressed the jury more strongly with a belief that the conversation was seriously intended by the defendant, drawing this line of demarkation between the grounds on which new trials are in general granted, on account of the rejection of a witness who is prepared to give evidence relative to the issue, and the case before them; that in the former case the Court cannot weigh the degree of relevancy, or say what effect any fact that is relevant, would have had on the minds of the jury; but that in the latter, the defence had not proceeded on any contradiction of what had passed on the occasion in question, so as to render his testimony material; that the objection merely was, that what was proved by one witness could have been proved by two, the other witness's account of the conversation being admitted to be exactly correct, and it not having been even so much as suggested, at the time, that the evidence of the rejected witness went further; but the defendant having gone to the jury, on a defence altogether collateral to that fact; viz. that what was said by the defendant was in joke, and by way of ridiculing the pretensions of a stranger candidate, who professed that it was not his intention to offer money for votes. See 4 Burr. 2283. and 1 El. 665.

4. HEWARD v. SHIPLEY. T. T. 1803. K. B. 4 East. 180.

But it is now clear that he is; and it is therefore settled, that a person [685] bribed is a good witness to prove the bribery.

This was an action upon the statute 2 Geo. 2. c. 24. for bribery at the election for Durham, and was tried at the sittings after Easter Term, 1803. There was a verdict for the plaintiff for one penalty. The bribery was charged to have been committed by the defendant giving a sum of money to one Robinson, to procure him to vote for Richard Wharton, Esq., one of the candidates for that city. The verdict was found on the evidence of Sir Harry Vane Tempest, who was himself a candidate, and against whom an action had been brought for bribery at the same election, but who claimed to be the first discoverer, which, in case of his procuring the conviction of the defendant in this action, would under the clause in that statute, have defeated the action then depending against himself. This, it was contended, was such an interest as rendered him incompetent. But on a motion for a new trial on this objection, it was decided, that the statute having enacted, "that any offender against the discovering of any other offender, who was convicted, the discoverer should be discharged from any penalty incurred by him within the act, and for which he had not been convicted," had thereby intended to make such discoverer a witness, as necessary perhaps to the conviction; so that

without his evidence, no conviction could perhaps take place; and to reject him, therefore as a witness, might be thereby to render the statute nugatory. The court therefore held, that he was a competent witness.

(e) *Of the damages.*

CUMING V. SIBLEY. M. T. 1770. K. B. 4 Burr. 2489,

In error upon a judgment in C. B., in an action of debt, upon the bribery act, it was said, that a verdict had been given for the plaintiff for 1000*l.*, and 1*s.* damages besides costs. The error assigned was, that the plaintiff is not entitled to damages; no damages for detention of the debt can be given in a popular action. *Per Cur.* There are no damages to be given in these popular actions. Where the plaintiff below brings a writ of error, we may not only reverse what is wrong, but give judgment for what is right. Where the defendant below brings a writ of error, we only reverse such wrong part of the judgment as he complains of. Here the plaintiff has no right to the debt till after conviction; therefore, he can have no right to damages for the detention of it; and as the costs and damages are incorporated, the judgment must be reversed as to both damages and costs.—Judgment reversed both as to the damages and costs, and affirmed as to the debt.

(f) *Of staying proceedings on account of wilful delay.**

PETRIE V. WHITE. H. T. 1789. K. B. 3 T. R. 5.

In an action of debt under the statute 2 Geo. 2. c. 24. for bribery, it appeared that the offence was committed in the year 1780. The writ was sued out in due time, and the declaration delivered in May, 1782. In the term of that year, the defendant pleaded the general issue, and the plaintiff gave notice of trial for the following summer assizes. The plaintiff did not proceed to trial, nor carry down any record to those assizes, and took no proceedings till 1788, when he gave fresh notice of trial for the summer assizes of that year. The trial then took place, and the plaintiff had a verdict for two penalties. In the next term the defendant applied to the Court to stay the proceedings, and obtained a rule for that purpose, on the ground of the plaintiff having been guilty of wilful delay. and that, therefore, the Court would interpose to give effect to the act of parliament, which prohibited it. On the showing cause, it was resolved by the Court, 1st, that by not taking any step or proceeding in the cause for six years, that is, from 1782 to 1788, the plaintiff had been guilty of wilful delay; 2d, that the defendant did not come too late in his application to the Court after a verdict, though he might have come in an earlier stage of the proceedings, and could have had the benefit of the Court's interference, upon motion; 3d, that having shown to the Court what they held to be wilful delay, they were bound, by the words of the statute, to take notice of it, not as a matter of favour to the defendant, but as a matter of right; and 4th, that all further proceedings should be stayed, and that the plaintiff should pay the costs of the trial.

II. INDICTMENT AND INFORMATION FOR.

(A) AT THE ELECTION OF MEMBERS OF PARLIAMENT.

1. REX V. PITT. T. T. 1763. K. B. 1 Blac. 380; S. C. 3 Burr. 1335.

The defendants were convicted on an information at common law, for bribery, at the general election at Ilchester. Pitt being the bribing agent, and Mead, the voter, bribed, and being brought up this term for the judgment of the Court, a doubt was started from the bench what judgment the Court could

Notwithstanding the 2 G. 2. it has been held, that bribery at elections of members

* Where there has been wilful delay, the defendant cannot avail himself of it at the trial; but he must move the Court to stay the proceedings; see 3 T. R. 5.

† Which provides, that no person shall be made liable to any penalty, &c. unless prosecution be commenced within, &c. after, &c. or in case of a prosecution the same be carried on without wilful delay; see 49 Geo. 3. c. 118. The 9 Geo. 2. c. 38. explaining this provision, only applies to that part of it which relates to commencing the suit, defining what shall be considered a commencement, and does not take away the privilege reserved to the party prosecuted by the latter part of the proviso; see 3 T. R. 5.

‡ As the rule of court for staying the proceedings cannot be put on the record, the plaintiff can bring no writ of error; 3 T. R. 9.

crime at common law, that the legislature never meant to take away the common law crime, but to add

[687] a penal action; but the Court will not interpose by information until the time limited for commencing the prosecution by action has expired.

or ought to give upon the present prosecution, it being within the time limited for a prosecution under the statute, viz. the two years established by 2 Geo. 2. c. 24. "which inflicts a penalty of 500*l.* to be recovered by any common informer; and likewise enacts, that after judgment had against the defendant, or his being any otherwise lawfully convicted of bribery, &c. in elections, he shall for ever be disabled to vote in any election to parliament, and also to hold any office or franchise in any city, borough, town corporate, or cinque port." Lord Mansfield, C. J. delivered the resolution of the Court; he premised that wherever a practice, which is wrong or unreasonable, has happened to have been introduced for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately as soon as the inconvenience is observed, if former cases be not affected by the retrospect. Bribery at elections for members of parliament must undoubtedly have been a crime at common law, and consequently punishable by indictment or information; and the statute 2 Geo. 2. c. 24. has introduced a very severe penalty, in order to enforce the laws then already in being, and because they had not been sufficient to prevent the evil. It is true, that some informations at common law have, since the commencement of this act, been applied for, and granted within the two years; but it now appears, upon looking into the matter, that granting such information at the suit of a prosecutor, subsequent to the making of this act of parliament, was a point never litigated or argued, or particularly considered; the case of *Spinage*, in the borough of Abingdon, E. F. 17 Geo. 2. B. R. very likely was apprehended to be a precedent for it; but that was bribery in the election of a mayor, an offence for which there was no extraordinary remedy provided by stat. In such informations as are carried on by private prosecutors, the costs stand upon a very different footing from the costs given to those who sue upon this statute; this act gives the person who recovers the penalty full costs of suit. This crime certainly still remains a crime at common law; the legislature never meant to take away the common law crime, but to add a penal action. This appears by the words, "or being any otherwise lawfully convicted thereof;" and we are all clear, that it still remains a crime at common law. And the present conviction, upon an information granted by the Court, is just the same as if the defendants had been convicted upon indictment. But this case has raised a great doubt in our minds upon the propriety of granting informations within the two years. The showing cause and the trial, may be an auxiliary to the penal action. After a conviction, the Court is under great difficulty "what punishment to inflict;" not knowing whether the penal action may follow, or not. As at present advised, we all think, that in general, the Court never ought to interpose by information. After judgment for the penalty, they certainly would not interpose to grant a second prosecution in an extraordinary way by information. By parity of reason, it ought not to be granted while the person is liable to such judgment. If there is evidence to convict, there is evidence to support the action of a common informer. There may possibly be particular cases, founded on particular reasons, where it may be right to grant informations before the limited time for commencing the prosecution is expired; but the present case is not one of them. And this Court now considers the two defendants as remaining still liable to the forfeiture and disabilities directed by the act of 2 Geo. 2. as the time limited for commencing prosecutions upon it is not yet expired; and, therefore, in adjusting the punishment which ought at present to be inflicted upon them, they do not consider it as a punishment adequate to their offence; but as an additional punishment over and above the punishments inflicted by the act of parliament; to which statute punishments they still remain liable.

2. *REX v. HEYDON*. M. T. 1763. K. B. 3 Burr. 1359; S. C. 3 Burr. 1389.

[688] In this case, the defendant having been convicted of bribery at an election for members to parliament, the Court, at the instance of the defendant (no opposition being made on the behalf of the prosecution), adjourned the passing of sentence from Michaelmas term until the first day of Easter term following, where a par

because the two years for suing under the statute would expire in the intermediate month of March; and they took the defendant's own recognizance in 100*l.* for his appearance. The defendant appearing in Easter term, the Court (the time for bringing the penal action being elapsed) sentenced him to pay a fine of 200*l.* and be imprisoned for two months, and until the fine be paid.

(B) AT THE ELECTION OF CORPORATE OFFICERS.

REX V. PLYMPTON. M. T. 1724. K. B. 2 *Ld. Raym.* 1377.

An information was exhibited against the defendant for promising money, &c. to one W. H. a member of a corporation, to give his vote for the election of a mayor and certain other officers of the corporation of T. in the county of D. On not guilty pleaded, the defendant was found guilty; and the defendant's counsel moved in arrest of judgment, that by so much of the charter as is set out in the information, it did not appear that the defendant or W. H. as assistants, had a right to vote at any election but that of a mayor; and if there are any clauses in the charter which enable assistants to vote at the election of other officers, they should have been set out; for want of which it is informal; and it is not sufficient to aver that W. H. had a right to vote at the election of the other members of the corporation; but the offence charged is for soliciting W. H. to vote not only at the election of a mayor, but also of the other members; which is laid as one entire offence, and the fine must be for the whole; but it ought not to be for soliciting W. H. to vote at the election of other members, because he had no right to vote at them. Then the counsel further urged, here was no offence at all charged; for it is lawful for one member of a corporation to ask or persuade another to vote for his friend; and if he made such a promise as in this information, it will be no crime, without showing the fact was done, that the money was paid and accepted by W. H. Besides, the election of other members might only be of common councilmen, who are not magistrates, but only in the nature of private persons; and in such case, the offer of money to vote for them would be no offence punishable by information. And the promise here is void, because there is no good consideration for it. But the Court were of opinion, that to bribe persons either by giving them money or promises, to vote at elections of members of corporations, which are created for the sake of public government, is an offence for which an information will lie, and that W. H.'s right to vote was sufficiently laid; therefore, judgment was given against the defendant. See ante, 676. and 679; and also *Burr.* 2496.

time, the Court ordered him to enter in to a recognizance to appear after its expiration.

It is criminal to promise money to any man who has a vote in the election of the members of a corporation, and upon a prosecution for the offence it is sufficient to allege generally that such party had a right to vote.

(C) AGAINST PERSONS FOR ATTEMPTING TO BRIBE.

(a) *Public ministers.*

REX V. VAUGHAN. M. T. 1769. K. B. 4 *Burr.* 2494.

An information for a misdemeanor, at the private prosecution of the Duke of Grafton, first Lord of the treasury, was moved for against the defendants. An affidavit of the Duke of Grafton was produced, proving a letter to be received by him from the defendant, containing an offer to pay 5000*l.* into the hands of H. N., to be delivered by him to the person who should procure a patent of the reversion of the office of clerk of the supreme court of the island of Jamaica, for the lives of the defendant's three sons. or the lives of three other persons to be named by him. Affidavits to authenticate the handwriting of the defendant were also produced. The defendant sent a case also to the Duke, desiring his perusal of it at his leisure; which case related to the nature, &c. of this office. It was accompanied by a letter to his grace, inclosing an affidavit; which affidavit the defendant says, "will show the proposal, which will be enlarged, if necessary." The letter offers to "leave security in H. N.'s hands, to answer the paying 5000*l.* to the order of the person who shall procure the said patent." And it concludes—"I will take an opportunity of waiting upon your grace, hoping the honour of a conference; otherwise, to receive back this affidavit, in order to destroy the same." The affidavit enclosed in this letter was made before the Lord Mayor of London. It repre-

It is an indictable offence, to attempt to bribe a public minister.*

* Or for any person in an official situation, corruptly to use his power or interest; 1 *East.* P. C. 188; 4 *Burr.* 2494.

sented this to be a matter that required the utmost secrecy, and it is thereby sworn, "that this whole affair is an entire secret to every one but H. N.; and that, whether his present proposal shall prove efficacious, or be rejected, he never will disclose it to any person whatsoever."

Per Cur. If these transactions are supposed to be frequent, it is time to put a stop to them. A minister trusted by the king to recommend fit persons to offices would betray that trust, and disappoint that confidence. if he should secretly take a bribe for that recommendation. A terrible consequence would result to the public, if every thing such an officer is concerned in advising the disposal of should be set up to sale. We are clear, that this is a misdemeanor, and punishable as such. But, nevertheless, we shall be open to hear arguments on a demurrer, or in arrest of judgment, without prejudice. As to the statute of 12 R. 2. c. 2. and 5 & 6 Ed. 6. c. 16. "the argument does not turn upon their extending or not extending to Jamaica." For this act is granted under the great seal. The argument is strong, and these statutes do not extend to Jamaica, for they were enacted long before that island belonged to the crown of England. If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror thought fit to alter them. If it is considered as a colony (which it ought to be, the old inhabitants having left the island,) then these statutes are positive regulations of police, not adapted to the circumstances of a new colony, and, therefore, no part of that law of England which every colony from necessity is supposed to carry with them at their first plantation. No act of parliament made after a colony is planted, is construed to extend to it, without express words showing the intention of the legislature to be "that it should." But here, the office is granted by letters patent under the great seal of England; and, therefore, must be governed by the laws of England. So that it turns upon the common law. And the first consideration is; whether a great officer, at the head of the treasury, and in the king's confidence, selling his interest with the king, in procuring an office, be not guilty of a crime. The king is not to raise a revenue out of this office. The duke swears, and it is not denied, "that the 5000*l.* was offered to him, to procure this office for the defendant." Can it be doubted whether the doing this would have been criminal in the Duke of Grafton? I suppose that most of the impeachments against ministers have been for taking money to procure offices grantable by the crown. Wherever it is a crime to take, it is a crime to give; it is reciprocal. And in many cases, especially in bribery at elections to parliament, the attempt is a crime; it is complete on his side who offers it. And so also must be an offer to bribe a privy counsellor to advise the king. Therefore, it appears to us that this is a misdemeanor.

(b) *Judges.*

REX v. VAUGHAN. M. T. 1789. K. B. 4 Burr. 2494.

It seems an indictable offence to attempt to bribe a judge.

The Court, in this case, laid it down generally, that if a party offer to bribe a judge, meaning to corrupt him in a cause then depending before him, although the judge does not take it, yet it is an offence punishable by law in the party that offers it. See 3 Inst. 147; Esp. 231.

(c) *Jurymen.*

An information lies for attempting to bribe a jurymen.

YOUNG'S CASE. Cited **REX v. HIGGINS.** M. T. 1801. K. B. 2 East. Rep. 14. In this case the Court appears to have considered an attempt to bribe a jurymen in giving his verdict, an offence for which an information would lie

(d) *Officers of Excise.*

Persons offering bribes to officers of excise to neglect their duty, or officers of excise

By the 24 Geo. 3. c. 47. s. 32. it is enacted, that if any officer of the navy, customs, or excise, shall make any collusive seizure, or shall deliver up, or agree to deliver, or not to seize any vessel or goods liable to forfeiture by that or any other act, or shall directly or indirectly receive any bribe, gratuity, recompence, or reward, for the neglect or non-performance of his duty, such officer shall forfeit 500*l.*, and be incapable of serving his majesty in any other office or employment civil or military; and if any person shall give, offer, or promise to give any bribe, recompence, or reward to, or make any collusive agreement with, any officer of the navy, customs, or excise. to do, con-

ceal, or connive at any act, whereby the provisions of the act relative to the customs or excise may be evaded or broken, such person shall (whether the offer, proposal, &c. shall be accepted or performed, or not) forfeit 500l.

(e) *Clerks to public offices.*

REX v. BEALE. E. T. 1797. K. B. Cited 1 East. 183.

This was an indictment against the defendant, who was clerk to the agent for the French prisoners of war at Porchester castle, for taking bribes in order to procure the exchange of some of them out of their turn. It was removed from the sessions, where it had been found, to this court, by *certiorari*. The Court inflicted a heavy punishment upon the defendant.

Brickmaker. See tit. Bankrupt.

Bricks. See also tit. Tiles.

LAW v. HODSON. T. T. 1809. K. B. 11 East. 300.

This was an action to recover the price of certain bricks sold by plaintiff to defendant. It appearing, however, at the trial that the bricks were not of the dimensions required by the stat. 17 Geo. 3. c. 42.* of which the defendant was ignorant at the time he purchased them: the plaintiff was nonsuited, *although it was proved that the bricks had been received and used by the defendant*, on which ground a motion was now made for a rule nisi to set aside the nonsuit, when it was contended that by such acts the contract became executed, and that however the breach of the law might have been a reason for the defendants returning the bricks when he discovered them to be under the statutable measure, yet as the legislature had not rescinded the contract itself, but only subjected the brickmaker to a penalty, the plaintiff's action was supportable. But the Court said, this was a fraud upon the buyer, whom the legislature meant to protect. He gave credit to the maker at the time that the bricks were of the statutable size, and they turned out to be all under size.—Rule refused. See 11 East. 180; 1 M. & S. 593; 5 T. R. 699.

Bridges.

* Sect. 1 & 2. which enact that all bricks made for sale, when burnt, be not less than 8 1-2 inches long, 2 1-2 inches thick, and 4 inches wide; and all pantiles not less than 13 1-2 inches long, 9 1-2 wide, & half an inch thick, on pain that the maker shall forfeit 20s. for every 1000 bricks, and 10s. for every 1000 pantiles, and so proportionably for a greater or less number.

Sect. 3. And the size of the sieves or screens for sifting or screening sea-coal ashes, to be mixed with brick earth in making of bricks, shall not exceed 1-4 of an inch between the meshes.

Sect. 4. All contracts for enhancing or fixing the price of bricks or tiles shall be void; and every brickmaker, tilemaker, or other persons interested in the making for sale, offending therein, shall forfeit 20l.; and every clerk, agent, or servant, 10l.; half to the poor, and half to him who shall sue in six calendar months in one of the courts at Westminster.

Sect. 5. All other penalties and forfeitures, not herein otherwise directed, shall be recovered before one justice, on proof by confession, or oath of one witness (the oath to be administered *gratis*), to be levied by distress, and distributed half to the informer, and half to the poor of the parish where the offender dwells; and if sufficient distress shall not be found, or such penalties and forfeitures shall not be forthwith paid, the justice shall commit the offender to the common gaol, or house of correction, for the place where the matter shall arise, for any time not exceeding two calendar months, unless such penalties and forfeitures, and all reasonable charges, shall be sooner paid.

Sect. 6. Contains the form of the conviction.

Sect. 7. But no penalty in respect of the dimensions of bricks or tiles shall be recovered, unless the information shall be laid within one calendar month after sale or delivery of bricks or tiles. And by Sect. 8. Persons aggrieved may, within four calendar months after the cause of complaint shall have arisen, appeal to the general quarter sessions for the county, riding, division, or place, giving 21 days notice at the least in writing of his intention to bring such appeal, and of the matter thereof, to the person or persons whose acts are complained against, and within eight days after such notice, entering into recognizance before a justice, with two sureties conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded at such sessions. And the justices at such sessions, on proof of such notice and recognizance, shall hear and determine the appeal in a summary way, and award such costs to the party appealing, or appealed against, as they shall think reasonable; and their determination shall be conclusive and no order or other proceedings in the premises shall be quashed for want of form, or removed by *certiorari*, or other process, into any of his majesty's courts of record at Westminster.

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taking bribes not to do their duty, subject themselves to penalties.

An indictment was held to lie against a clerk to an agent for prisoners of war for taking bribes to procure the exchange of some of them out of their turn.

The price of bricks under the statutable size sold to a vendee ignorant of the fraud, cannot be recovered.

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I. RELATIVE TO THE ERECTION OF BRIDGES.

1. PAYNE V. PARTRIDGE. E. T. 1691. K. B. 1 Salk. 12; S. C. 1 Show. 257.

No person can erect a public bridge without a licence, and an *ad quod damnum*.*
The declaration stated, that Littleport is an ancient vill, and there has been time out of mind a ferry there, over the river, which was a common passage for all the king's subjects on paying toll, and that the inhabitants of Littleport living in the ancient messuages or cottages there were entitled to passage toll-free; and that the defendant was owner of the ferry, and suffered it to run to decay, and that the defendant refused to let the plaintiff go over the ferry, though requested so to do. Defendant pleaded he had built a bridge in the room of it, &c. On demurrer, the Court held the owner could not put down the ferry and build a bridge without license and an *ad quod damnum*; and that the custom was good in the nature of an easement, but that the custom consisted not in the right to pass, for that was common to all the king's subjects, but the right to pass toll-free. That therefore plaintiff could not maintain an action, for not passing; for so any other subject might bring an action, which would occasion endless litigation. *Aliter*, if toll had been exacted, and paid by him; that had been a special damage; but without special damage, a person can only indict or bring an information.

2. REX V. THE INHABITANTS OF THE WEST RIDING OF YORKSHIRE. E. T. 1802. K. B. 2 East. 342.

A bridge built in a public way without public utility, is indictable as a nuisance.
Per Cur. It is a clear rule of law, that if a bridge be of public utility, and used by the public, the public must repair it, though built by an individual. There may indeed be attempts to make a colourable use of this doctrine, as by building bridges at first in a slight and imperfect manner, for the purpose of throwing the expense immediately on the county; but if that were shown, we should think that it was a public nuisance, and indictable.

3. REX V. THE INHABITANTS OF THE COUNTY OF KENT. E. T. 1814. K. B. 2 M. & S. 513.

Indictment for not repairing a bridge; plea, that long before the time of

* And no one can be compelled to make a bridge in a highway, where there was not one before, unless by act of parliament; 2 Inst. 701. So a county cannot change a bridge from one place to another without the sanction of the legislature; Mod. Ca. 307.

erecting the bridge, on the same place and part of the river, where the bridge [694] was afterwards erected, there was, and from time immemorial had been, until the deepening the water hereinafter mentioned, a public highway through the ford in the said river, &c. And that certain persons did on the 1st Jan. 1767, erect in and across the river a certain mill, dam, and works appertaining thereto; and did thereby for their own profit, &c. obstruct and deepen the water in that part of the river where the ford and highway before was, &c. and did by such deepening, &c. destroy the ford, and render the highway wholly impassable; and it then and there became and was necessary for the passage of the king's subjects, with their cattle and carriages, and the duty of the said persons to erect a bridge, &c. whereupon the said persons on the 1st December in the year aforesaid, did first erect the said bridge in the said place, and part of the river, &c. and the old highway was altered from its ancient course through the ford, unto and over the bridge, and has so continued. It then proceeded to state the name of the proprietor of the mill, &c. and that he and his predecessors, proprietors of the mill, &c. had from the time of erecting the bridge, repaired it, and that they ought still to keep it in repair. The proprietor of the mill replied, that the county ought to repair. The evidence at the trial was in conformity with the plea. A verdict was found for the crown, (but with leave for the defendants, the inhabitants of the county of Kent, to move for a new trial, which was accordingly done,) on the ground that by the stat. 22 H. 8. the county was liable to repair all public bridges within the county, unless they could show that others were liable by prescription, or by reason of tenure.

On the motion for a new trial, it was insisted by the counsel for the inhabitants of the county, that as the creation of the bridge originated in a wrongful act, and for a private benefit, notwithstanding the public had used, they should not be deemed to have adopted it, so long as the private benefit continued; they cited in defence of this doctrine, 1 Rol. Abr. 368; 5 Burr. 2597; 2 East. 249. Lord Ellenborough, C. J. gave the judgment of the Court. He said, on the argument the Court had been pressed particularly by the case in 1 Rol. Ab.; and therefore they had looked into the record of that case, as it seemed to constitute an anomaly in the law, and to be at variance with all the other cases, though an attempt to reconcile it in the case in 5 Burr. on a distinction between an obligation to repair, and an obligation to erect; but that they found that no such question as that supposed by Lord Rolle in his report had been agitated. Laying that case, then, out of the way, the authorities from first to last are uniform, and establish the case as cited by Northey, Att. Gen. in *Rex v. inhabitants of Wilts*, 1 Salk. R. 359. "that if a private person build a private bridge, which afterwards becomes a public convenience, the county is bound to repair it." The consequence of which is, that there must be judgment against the defendants.

4. *REX v. KERRISON*. H. T. 1815. K. B. 3 M. & S. 526. S. P. *REX v. THE INHABITANTS OF KENT*. 13 East. 220. S. P. *REX v. THE INHABITANTS OF LINDSAY*. 14 East. 317. [695]

Indictment for not repairing a bridge; plea, not guilty. Verdict for the crown, and case reserved for the opinion of the Court of B. R. The indictment set forth, that "by stat. 22. car. 2. certain persons and their successors were appointed commissioners for making navigable the river Waveney, from does not a Beccles to Bungay, and for that purpose to cleanse, &c. and to cut, dig, or use mount to the ground or soil of any person for the making, enlarging, straitening, or altering the channels of the river, or for making any new channel, &c. That by virtue of the said act, a certain navigable channel was by the undertakers cut and dug, &c. over a certain ancient common highway, &c. by means whereof the said highway was stopped up, and rendered wholly impassable, &c.; and that the undertakers have continued, &c. and still do continue and maintain the said channel for the purpose of the navigation of the said river for their own benefit, profit, and convenience, &c. and did become liable to erect, and did on the 1st March, 1695, erect a bridge over the said navigation,

and became and were taken, and have been accustomed, and ought to keep, the same in good repair, &c. by reason of the tolls and rates granted them by the said recited act." There were other counts, but the substance of them was the same as in the question for the Court, which was, — whether the defendant, who had become owner and possessor of the navigation, was liable to repair the said bridge. There was no direct evidence of whom the bridge was actually built, and it had been previously repaired by the proprietor of the navigation, and even by the defendant. It was in use in the said navigation, and was necessary for the public to pass on the highway. It had never been repaired by the inhabitants of Norfolk. The defendant receives the toll upon the navigation for the passage of vessels, but tolls are paid for the passage over the bridge. For the crown were cited *Rex v. Stoughton*, 2 Strad. 160; *Rex v. Kent*, *inhabitants* 13 E. R. 220; and *Rex v. Lindsay*, *inhabitants* 14 E. R. 317; for defendant, *Rex v. Kent*, *inhabitants* 2 Maule and Selwyn, 513. Lord Ellenborough, C. J. said, the undertakers of this navigation have a duty arising out of the execution of their own powers under the act. The statutes enable them to cut new channels as occasion may require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge. This case differs from that of *Rex v. Kent*, *inhabitants* in *Maule and Selwyn*. There the county derived a very essential benefit from the bridge, for before they had only the passage of a ford, which is always an inconvenient one; but it would be difficult to discover what benefit the county of Norfolk could derive from passing over a bridge, instead of a solid highway. — Judgment for the crown.

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II RELATIVE TO WHAT WILL BE DEEMED PUBLIC BRIDGES.

1. *REX V. THE INHABITANTS OF BUCKS.* H. T. 1710. K. R. 12 East. 192. S. P.
REX V. THE INHABITANTS OF YORKSHIRE. E. T. 1722. K. R. 2 East. 342.
S. P. REX V. THE INHABITANTS OF GLAMORGAN. H. T. 1723. K. B. id. 356.

Whether a bridge can be deemed a public one, does not depend on its description, nor on its projector; hence a bridge of public utility, built by an individual, dedicated to, and accepted by, the community is a public bridge.

Queen Anne, in 1703, for her greater convenience in passing to and from Windsor, built a bridge over the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before. It was in this case held, that the inhabitants of the county of Bucks, who, in answer to an indictment for the non-repair of that part of the bridge 13 years afterwards, pleaded these matters, and traversed that the bridge was a common public bridge, were bound to build and repair it; and Lord Ellenborough, in delivering the judgment of the Court, observed; the words themselves, viz. "public bridges," do not occur in the statute of 22 H. 8. c. 5., called the Statute of Bridges. But the sense of these words may be very distinctly inferred from that statute, which empowers the justices of the peace, in their general sessions, to inquire of "all manner of annoyances of bridges broken in the highways," and applies to bridges of that description all its subsequent provisions; and, amongst others, that which casts upon shires and ridings the repair of bridges situated within them (and without any city or town corporate), "where it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parish; nor what person certain, or body politic ought, of right, to make such bridges decayed, *i. e.* such bridges broken in highways." If the meaning of the words "public bridge," could properly be derived from any other less authentic source than the statutable one I have mentioned, they might safely be defined to be such bridges as all his majesty's subjects had used freely, and without interruption, as of right, for a period of time competent to protect them, and all who should thereafter use them, from being considered as wrong doers, in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned. The circumstances of the removal,

and application of the materials of the bridge to his majesty's use, cannot render it less a public bridge within the statute. Upon the whole, therefore, in conformity with the letter and spirit of the Statute of Bridges itself, and with all the cases which have, in later times, been decided upon this subject, and particularly with that of Glusburne Beck bridge (*Rex v. the inhabitants of the west riding of Yorkshire*, 5 Burr. 2594.), and the principles there established, and since recognised in several subsequent cases, we are of opinion, that this bridge, situate in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, was and is a bridge repairable by the county.

2. *REX V. THE INHABITANTS OF THE COUNTY OF SALOP.* M. T. 1810. K. B. [697]
13 East. 95.

Per Cur. All public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair them.

8. *REX V. THE INHABITANTS OF THE COUNTY OF NORTHAMPTON.* H. T. 1814.

K. B. 2 M. & S. 262. S. P. *THE KING V. THE INHABITANTS OF THE COUNTY OF DEVON.* 1 R. & M. 144.

An indictment for the non-repair of a bridge over a river in a highway leading from A. to B., and which, it was alleged was used by the subjects of the King, with their horses, carts and carriages, of *all such times when it hath been, or is dangerous to pass through the river by the side of the bridge* was objected to, on the ground that it did not show the bridge to be a public bridge, but only a bridge to be used on particular occasions, which could not be if it were a public highway. But Lord Ellenborough, C. J. said, it is not necessary that the bridge should have been open at all times; perhaps it has grown out of this circumstance—that there was a highway through the ford; and the people, when that was bad, were used to go by outlets on the land adjoining, to the great detriment of the original owner. The bridge, therefore, like many others, may have originated in the convenience, and for the protection of the individual; but still it may be of public right. A verdict was entered for the crown, and the court afterwards refused to grant a rule nisi for a new trial. See 1 Campb. 262. n.

Whether it be a foot, horse, or carriage bridge.

Nor is it necessary that it should be always open, for a bridge may be viewed as a public one, if the dedication to the community be absolute, although it be finite as to time.

III. RELATIVE TO THE OWNERSHIP IN THE MATERIALS.

HARRISON V. PARKER. H. T. 1805. K. B. 5 East. 154; S. C. 2 Smith's Rep. 262.

A, granted liberty, licence, power, and authority to B. and his heirs, to build a bridge on his land; and B. covenanted to build the bridge for public use, and to repair it, and not to demand toll. Upon a question now coming before the Court, whether the property in the materials of the bridge, when built, and dedicated to the public, still continued in B., subject to the right of passage by the public; and whether, when severed, and taken away by a wrong-doer, he might maintain trespass for the asportation, the Court said, if it were necessary, in deciding this case, to say whether B. can maintain trespass for pulling down this bridge, it might become necessary to consider, whether the property in the bridge passed to him by the grant stated in the case. But that question is not material. The question is only this—whether the person of whose materials the bridge was constructed, and whose right of property in those materials is only suspended whilst they are employed for the purpose for which they are given to the public, does not take back his property in those materials when they are no longer applied to those purposes, whether, when the bridge, which is composed of certain elements (to use that expression) which belonged to him, is by some means resolved into those elements again, which were only dedicated to the public in the combined form as a bridge, the right of the person who so dedicated them to the public does not result again to him; and whether, as against a wrong-doer, by whom they were carried away and converted to his own use, he cannot maintain this action. Now, it must be understood, that these materials are dedicated, we will not say given, to the

The property in the materials of a bridge dedicated to the public, built by one under licence, on the soil of another, remains in the builder, subject to the right of passage; hence [698]

he may have trees pass for taking them away when severed.

public, because that implies the parting with the property only for the special purpose of constituting a public bridge, and for no other purpose, nor for any other time than so long as they continued in that form as a bridge, which seems to determine the question; but at the same time, we do not lay down that B. having so dedicated the materials, could himself have severed them from the bridge, or have destroyed it. We do not lay down that proposition one way or the other, it is to determine whether, in that case, he would or would not be liable, on an indictment, just as any other person. But upon the general question reserved for us, whether B. is entitled to recover, we think that he is; and we may observe, that where the founder of a College gives his lands to the purposes of the foundation, and the body becomes wholly extinct, the property results to his heirs; but we put this case merely by the way of analogy, and not as a case of identity, for we will not say that it is applicable in all respects; and had the county used the stones and materials again in the repair of the bridge, no action would lie against the person who should so use them.—

Judgment for the plaintiff.

But actions brought for injuries done to public bridges, shall be in the name of the surveyor or.

The county being in all cases *prima facie*

bound to repair bridges within its district, will be holden liable to repair *instantly*, where the public [699]

contention requires it, and where they are indicted and do not properly show their non-liability, they must pursue their remedies against the parties legally responsible. As by charging a particular person.

Or by showing that owners of land have done it from time immemorial.

And by the 40 Geo. 3. c. 59. s. 4. the inhabitants of counties may sue for any damages done to bridges and other county works, and for recovering any property belonging to such counties, in the name of their surveyor; and also shall and may be sued in the name of such surveyor; and no such action or prosecution, by virtue of this act, in the name of the said surveyor, shall abate or be discontinued by his death or removal, or by his act, without the consent of the justices in sessions. Every such surveyor shall be reimbursed out of the moneys in the hands of the treasurer of such county, all such costs and charges as he shall be put unto by reason of his being so made plaintiff or defendant, and also all the costs and charges of prosecuting indictments, or other proceedings, against any persons whomsoever.

IV. RELATIVE TO THE REPAIRING, WIDENING, AND REMOVAL OF BRIDGES.

(A) WHO ARE BOUND TO REPAIR AND WIDEN.

(a) Of Counties.

1. REX v. THE INHABITANTS OF OXFORDSHIRE. M. T. 1812. K. B. 16 East. 223.

In this case the county were indicted for the non-repairs of a bridge. They pleaded the liability of A. B. to repair *ratione tenuræ*, instead of A. B. jointly with C. D. A verdict was found against them. The Court, however, subsequently allowed a rule, which had been obtained for staying judgment, to be drawn up upon the payment of the costs of the prosecution; And Lord Ellenborough, C. J. added, that if the public exigency required it, the county must repair without prejudice to this case; and Le Blanc, J. said, that the county might proceed to indict the parties whom they contended to be liable.

2. REX v. THE INHABITANTS OF WILTS. T. T. 1714. K. B. 1 Salk. 359; S. C. 6 Mod. 307; S. C. Holt. 339. S. P. REX v. COUNTY OF SURREY. H. T. 1723. R. B. 8 Mod. 120.

Information against the county of Wilts, for not repairing a bridge. They pleaded that the village of L. ought to repair. It was proved that the justices of the sessions had made an order on the village to repair it. But the Court held that was no evidence; for the justices might indict for the neglect but could not make an order; and the county are liable, unless they can charge a particular person.

3. REX v. THE INHABITANTS OF NOTTINGHAM. T. T. 1673. K. B. 2 Lev. 112.

Information against the inhabitants of the county of N. for not repairing a bridge, which time out of mind, they have and ought to repair. Two of the inhabitants in the name of themselves and of the rest, pleaded that L. and other persons, owners of lands, called bridgelands, ought to repair *ratione tenuræ*, and traversed that the inhabitants had and ought, &c. The Attorney-General replied, that the inhabitants ought, and traversed that L., &c. ought. The defendants replied that L., &c. ought; upon which they were at issue.

and *ex assensu partium*, it was tried at bar by a Middlesex jury *py* consent, and the defendants were found guilty.

4. *REX V. THE INHABITANTS OF THE WEST RIDING OF YORKSHIRE.* E. T. 1802 K. B. 2 East. 342.

The defendants were indicted for non-repair of a bridge; and the indictment stated the bridge to be situate upon a rivulet in the highway. The defendant pleaded, that after the making of a certain turnpike act, the said bridge was first made by order of certain trustees in the act named, in pursuance of directions, and for the purposes in that same act contained and named upon the said road, in the said act mentioned, and that no bridge had ever been before that time erected. To this plea the plaintiffs demurred. The question was urged at much length, but the Court held the defendants liable; and in giving judgment, adverted to most of the leading objections urged by counsel, and said; the county at large is *prima facie* liable to the repair of all public bridges within its limits, in the same manner as parishes are bound to repair all public ways within their district, unless they can show a legal obligation on some other persons or public bodies to bear the burden. This is most explicitly stated by Lord Coke (2 Inst. 700.) in his comment on the statute of bridges, 22 H. 8. c. 5. which was made in affirmance of the common law. The matter stated in the plea, is no answer to the indictment, because, though the bridge in question was built by the trustees, yet the law not having imposed on them the burden of repair, it necessarily devolves on the county, for the demurrer admits that it is a common public bridge, used by all the king's subjects. But this has been assimilated to the case in 13 Rep. 33. which says, that he who has the toll ought to stand to the repair, because by the act in question the trustees are empowered to take tolls. But that is supposing that the trustees are to derive some private advantage from the tolls, which is not the case; whatever tolls are raised must be laid out on the maintenance of the roads. Again the clause which has been referred to in the act, which enables the trustees to cut drains and throw arches over them, is confined to grounds lying contiguous to the roads and rivers, merely for the purpose of excusing them from being considered as trespassing, and not by way of throwing on them an additional burden of repairing such bridges. And the subsequent clause, which provides "that nothing in this act contained shall be construed to be a discharge of any riding, &c. or person for making, repairing, &c. any road, bridge, causeway, arch, drain, or sewer, which they have been accustomed and of right ought to make, repair, &c. by reason of any tenure, or by any law, ancient usage or custom," affords an argument that this act was not intended to make any alteration as to the general legal liability under the statute 32 H. 8. or by the common law either as to the repair of roads or bridges. We are aware of the extent of this opinion; and if the trustees, under similar acts, throw this burthen generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common law rule.—Judgment for the crown. See 5 Burr. 2594; 2 B. & C. 87; Cro. Car. 365; Salk. 259. S. C. Holt. 360; 6 Mod. 151. n.

5. *REX V. THE INHABITANTS OF YORKSHIRE.* E. T. 1802. K. B. 2 East. 342. S. P. *THE KING V. THE INHABITANTS OF GLAMORGAN.* H. T. 1788. K. B. id. 356. n. a. S. P. *THE KING V. THE INHABITANTS OF BUCKS.* H. T. 1810. K. B. 10 East. 192. S. P. *THE KING V. THE INHABITANTS OF THE WEST RIDING OF YORKSHIRE.* M. T. 1785. K. B. 2 East 353. n.

In this case the court made the following observations. It is laid down in 2 Inst. 700., that if a man build a bridge which is for the public benefit, the public ought to repair it. In order to effect this, it is not enough that a new bridge shall be built in a highway used by the public. It must also be useful to the public. In this particular case we do not lay a stress on the idea of the public having adopted the bridge by passengers going over it, because if it occupy the highway they cannot help using it. We only rely on the using of it so far as to show that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If however it be built

Public benefit is the criterion which decides whether the county are bound to repair; therefore the county or riding are liable to the repair of a bridge built by trustees under a turnpike act, in which there is no provision made for exonerating them.

[701] in a slight or inconvenient manner, no person can at his choice impose such a burthen on the county, and it may be treated altogether as a nuisance, and indicted as such. But if the public even then lie by without objection, and make use of it for some time, it is evidence that they adopt the act; and the bridge becoming of public benefit, the burden of repair ought properly to fall on the public.

6. *REX. v. THE INHABITANTS OF BUCKS. H. T. 1810. K. B. 12 East. 192.*
 Although • In this case, which was an indictment against the county of Bucks, for non-repair of a bridge erected by Queen Anne for her greater convenience in passing to and from London to Windsor, in lieu of an ancient ferry, where she kept boats for the public accommodation, and received tolls; and which she and her successors repaired till 1796, when it in part having fallen in, and become impassible, the whole was removed, and the materials converted to the use of the king, who re-established the ferry, the question was, whether this was a public bridge, and the defendants liable to repair and rebuild. Lord Ellenborough, C. J. delivered the opinion of the Court that this bridge, situated in a public highway, and used, as it so long was, for all persons as a public bridge, and being also of a great public use and convenience, was and is a bridge repairable by the county of Bucks, in which it was, until the period of the late dilapidation and destruction, situate. But he observed, that even if the words themselves could be considered as importing a mere purpose of private conveyance and use, and which, with reference to the public station and dignity of her majesty, and the public resort which must be had to her in the place of her residence, can hardly be; yet the contemporary as well as the immediately subsequent and continued use of this bridge on the part of the public, without any interruption, shows conclusively that her majesty contemplated a more general and public use of the bridge which she had built, indeed that she contemplated an use of the bridge as public as that of the ferry had been, which was discontinued upon the erection of the bridge. The circumstances of the removal, and application of the materials to his majesty's use, cannot render it less a public bridge within the statute, if it had effectually become so prior to that period; and the only way in which that circumstance operates is in the way of evidence, and in order to establish that the bridge was in its origin and purpose, a private one; a supposition which is in this case entirely repelled by the free and continued use of it on the part of the public, from the moment of its construction to its downfall and destruction in 1796.

But the county were held not liable to repair a county bridge

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whilst trustees who had been by statute appointed with certain powers enabling them to take down the old and build a new bridge were employed in the execution of the purposes of the act.

7. *REX. v. THE INHABITANTS OF SOMERSET. M. T. 1812. K. B. 16 East. 305.*

By the 49 Geo. 3. trustees were appointed for taking down the old bridge, and building a new bridge over the river Tone, and were empowered to take tolls, and out of the moneys received to build a new bridge. The statute vested the property in the old and new bridge during the continuance of the act in the trustees; and declared, that as soon as the purposes of the act were executed, then and from thenceforth the tolls should cease, and the bridge, &c. be repaired by such persons as were by law liable to repair the old bridge. A presentment was made (before the purposes of the act were accomplished) by a justice of the county in which the bridge was situate, stating that the inhabitants of the county were liable to repair, to which there was a plea stating their non-liability, as the trustees were the only parties responsible. There was a general demurrer; but the Court gave judgment for defendant, and said. the trustees are the individuals liable to repair; during the time the act is in force, the county are not bound to repair. The words "then and from thenceforth," necessarily lead to that conclusion. And Lord Ellenborough, C. J. observed, "If they are dilatory in executing the powers of the act, I am inclined to think that the Court, upon application, would lend its aid to expedite this function. See Salk. 609.

8. *REX v. THE INHABITANTS OF THE COUNTY OF CUMBERLAND. H. T. 1795. K. B. 6 T. R. 194; S. C. 3 B. & P. 354.*

The preced After verdict for the crown, at the assizes, against the inhabitants of the

county of C., for not repairing and widening a bridge. A motion was made in this court by the prosecutor, that a fine might be imposed on the defendants, &c. A question arose, among others, whether the inhabitants of a county, who are bound to repair, are bound to *widen* the bridges, if public convenience requires it. The Court were of opinion that they were bound to widen, if the exigencies of the public require it.

9. *REX V. THE WEST RIDING OF YORKSHIRE.* M. T. 1787. K. B. 2 East.

353. n.

To an indictment against a riding for not repairing a public carriage bridge, the plea alleged that certain townships had immemorially been used to repair the said bridge. Evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, was put in to support the plea, which it was urged was insufficient. The jury found for the defendants; but on a rule which had been for a new trial coming before the Court, they said; The indictment states the bridge in question to be a carriage bridge; and the defendants in their place admit it to be a carriage bridge; but they allege that other persons are bound by prescription to repair it. Now, there is no evidence whatever which tends to support that; on the contrary, it is shown that this never was a carriage bridge till within these few years; but was a foot bridge, which was kept in repair by the townships. Where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge; but still he shall only be bound to repair it as a foot bridge, that is, *pro rata*, for otherwise, counties are bound to repair all bridges of public utility.

(b) *Of individuals,*

1. *REX V. THE WEST RIDING OF YORKSHIRE.* E. T. 1770. K. B. 5 Burr. 2594; S. C. Blac. 685. S. P. *REX V. KERRISON,* H. T. 1815. K. B. 3 M. & S. 526.

This was an indictment for not repairing Glusburn bridge. The defendants pleaded a plea of *non debent reparare*; because, they say, that there was a certain ancient public foot bridge over Glusburne-Beck, and that the inhabitants of the township of Glusborne took down the said foot bridge, and in lieu and stead thereof, and in the place where the said foot bridge had been erected and stood, did erect and set up the said bridge, in the said indictment specified, for horses and carriages; and that the inhabitants of the township of Glusborne, from time immemorial, till the time of taking down the said foot bridge, had repaired the same; and from the time of erecting the new bridge, had repaired and ought to repair the same; and they traverse the right of the inhabitants of west riding "to repair," and upon that traverse issue was joined. On the trial of this cause, it appeared in evidence, that there was an ancient foot bridge over Glusburn-Beck, and a ford for horses, and another for carriages. That the inhabitants of Glusburne had always repaired the said foot bridge. In the year 1743, the inhabitants of Glusburne, being desirous of having a bridge for carts and carriages over the said stream, did apply for assistance to the general quarter sessions, which ordered the treasurer to advance the sum of 10*l.* as a gratuity out of the county stock, to enable the inhabitants to build a bridge over Glusburne ford. By a subsequent order of sessions, reciting that the execution of the above order had been suspended, it was then ordered, that the treasurer should pay the 10*l.*, provided that nothing therein should extend to charge the inhabitants of the riding, in time to come, with the reparation of the intended bridge. In pursuance of the said order, the sum of 10*l.* was paid. The inhabitants of Glusburne did build a bridge for carts, carriages, horses, and foot passengers, and pulled down the ancient foot bridge, and sold the materials thereof, and received the money for the same; which bridge, so built, was of public utility, and used constantly afterwards by all persons passing that road, till the same was taken away by a flood. The ancient bridge stood about 60 yards below the said new bridge, in the same highway. The said road was made a turnpike road in 1755; and, about 1766, the sum of 6*s.* was paid for a repair done to the new bridge, out

ing rules hold with regard to widening it if the exigencies of the public require it.

As where a public foot bridge, which had been always repaired by individuals, was enlarged to a carriage bridge and used as such by all the community, the county were held en liable to furnish the additional [703] funds which the increase had rendered necessary.

If an individual erect a bridge which the public adopt, they, and not he, are liable to repair it; but if it be a bridge from which the public derive no benefit, he is bound to repair it.

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of the tolls arising from the road; whereupon the defendants were found guilty, subject to the opinion of this Court, on the following question—Whether the inhabitants of the west riding are obliged to rebuild the said new bridge? The Court were all clear, that the riding was obliged to repair the new bridge; and observed, that this new bridge was not built in the same place where the foot bridge stood, but at the distance of more than 60 yards above it. The inhabitants of the county are of common right bound to repair all public bridges, because they are for the benefit of the county. By Magna Charta, no town or freemen shall be constrained to make bridges, &c., except those who were anciently and of right used to make them in the mean time of king Henry the Second. The inhabitants of Glusburne were not bound to build this new bridge for carts and carriages, nor are they obliged to repair more than they were before bound to repair; and they never were bound to repair a bridge, for carts, carriages and horses. What they were bound, by prescription, to repair, was only a foot bridge. They have built a quite different bridge, in a different place. This new bridge is for the common benefit and utility of the county, and the sessions approved of it, and contributed towards it. The case in 1 Ro. Abr. 368. tit. Bridges, pl. 2. about a mill erected for a person's own benefit, is a different case. That case is, that as a man erects a mill for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects used to go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit. There the private emolument continued to the person who erected it, and it was not reasonable for him to make the county contribute to it, whilst the private benefit continued to himself. But this bridge, for horses, carts, and carriages, was for the common benefit, use, and utility of the county in general, and therefore is within the rule, that if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it. It appears, that the quarters sessions approved of it, and even contributed to it.—Judgment for the crown.

2. *REX V. THE INHABITANTS OF THE COUNTY OF KENT.* H. T. 1811. K. B. 13 East. 220. S. P. *REX V. THE INHABITANTS OF THE PORTS OF LINDSAY, IN THE COUNTY OF LINCOLN.* T. T. 1811. K. B. 14 East. 318.

As where a company empowered to make a river navigable, and to alter such high ways as might injure the navigation, leaving others as convenient in their room, destroyed a public ford, substituting a bridge for

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it, held that they, not the county, were bound to repair it.

So a tenant at will was holden liable to re

The Medway Navigation Company were empowered under a local act, (16 & 17 Car. 2.) to make the river navigable, and to take tolls; and "to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room." &c. It appeared that they had, about 40 years ago, destroyed a ford across a river in the common highway by deepening its bed, and built a bridge over the same place. The inhabitants of the county were now indicted for not repairing such bridge. They pleaded that the company were bound to repair, and traversed their own liability. The Court held, that the company were responsible; and that, therefore, the indictment could not be supported against the defendants, observing, the statute gives power to the company to take or alter the highway for their own purposes, upon condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition; and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public.

3. *REGINA V. WATSON.* E. T. 1703. K. B. 2 Lord Raym. 856.

The defendant was indicted for that he was such a day possessed of a house in Lynn Regis, adjoining to the common bridge; that he ought to repair the said house *ratione tenuræ*; but that he permitted it to be so much out of repair that it was ready to fall on the queen's subjects passing over the said bridge, &c. Upon not guilty pleaded, the jury found a special verdict, that the defendant was but tenant at will of the said house; and ended with a special conclusion, praying the judgment of the court, whether he were obliged *ratione tenuræ* to repair the house. And after argument, it was adjudged that the de-

fendant, as tenant at will only, ought to repair the house, so that the public be pair a house not prejudiced by the want of repairs; but that he is not compellable to repair which projected over as to his landlord; and that is shown well enough in this indictment. The objection is, that he is not chargeable to repair *ratione tenuræ*; but though that is improper, yet it shall be intended of the possession, and not of a service. And judgment was given against the defendant.

(c) *Of corporate bodies.**

THE COUNTY OF WORCESTER V. THE TOWN OF EVESHOLM. M. T. 1686. K.

B. Skin. 251.

The sessions having made a rate for repairing a bridge, which was a common public bridge, and which all the county except the corporation of Evesholm had paid, they removed the order by *certiorari* into this court; when it was objected that the corporation were not liable to be taxed with the county, being taxable by themselves by the statute of 22 H. 8. c. 5. But the Court seemed to be of opinion that the corporation are rateable with the county; but the case was disposed of on another ground.

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(d) *Of lords of manors.*

REX V. BUCKNAL. M. T. 1702. K. B. 7 Mod. Rep. 55. 98; S. C. 6 Mod. 150; S. C. 1 Salk. 358; S. C. Holt. 128; S. C. 2 Lord Raym. 792. 84.

At a trial at bar on an information for suffering a common bridge to run to decay, which the defendants by tenure were obliged to repair, it was resolved, 1. That if a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands; every one of these alienees being tenants of any parcel, either of the demesnes or services, shall be liable to the whole charge, and are contributory among themselves. And though the lord of the manor might, on the several alienations, agree to discharge those that purchased of him from such repairs; yet that shall not alter the remedy for the public, but only bind the lord, and those that claim under him. As the whole manor, and every part of it in session of one tenant, was once chargeable with the reparation, so it shall remain, notwithstanding any act of the proprietor: it shall not be in his power to apportion the charge whereby the remedy for public benefit should be made more difficult, or by alienations to persons unable to render it, in respect of the parts which should come into such hands, quite void. 2dly. That though a manor subject to such charge, comes into the hands of the crown, yet the duty on it continues, and any person claiming afterwards, under the crown, the whole manor, or any part of it, shall be liable to an indictment or information for want of due repairs.

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(e) *Of hundreds.*

THE JUSTICES OF THE PEACE OF WILTSHIRE, CASE OF. M. T. 1717. K. B. Cited 4 Vin. Ab. 291.

The Court was moved for a *mandamus* to the justices of peace for the county of Wilts, to make an assessment upon the inhabitants of an hundred in the county, for the reimbursing two of the inhabitants of that hundred, who, upon an indictment against the inhabitants of that hundred for not repairing a bridge within the hundred, were distrained to appear and defend the said indictment, and upon that account were put to 30*l.* expense. The Court refused to grant

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* Corporate bodies are only bound to maintain bridges by *prescription*; but there is a difference between bodies politic or corporate, and natural persons: for the bodies politic or corporate may be bound by usage and prescription only, having a succession perpetual; but a natural person cannot be bound by the mere act of his ancestor, without a lien or binding; 2 Inst. 700. And where an indictment charged a corporation with a prescriptive obligation to repair a bridge, and a charter of incorporation granted by Edw. 6. was given in evidence, from the terms of which it appeared to be doubtful, whether the corporation had before existed immemorially, and whether lands had not been given for the repair of the bridge; but parol evidence was given that the corporation had in fact repaired the bridge as far back as living memory could go; it was holden that the parol evidence and the charter might be taken in aid of each other, and that the preponderance of evidence was, that this was a corporation by prescription, although words of incorporation were used in the incorporating part of the charter only, and that the corporation were still bound to repair by prescription, and not by tenure; see 14 East. 358.

a *mandamus*, because the justices had not power to make an assessment for that purpose, and said it was a hard case, but that no remedy was provided therein.

(f) *Of the persons who shall be deemed inhabitants of counties, hundreds, &c.*

Every household is an inhabitant; but not a servant, though he has a personal residence; 2 Inst. 703. So every one who has a house and servants there, though he resides in another county; *ibid*; Or a man dwelling in another county, who occupies land there; 2 Inst. 702; or a corporation which occupies land in another county; 2 Inst. 703; or an infant who has a house, or holds land there; 2 Inst. 703; or a man who holds land in right of his wife, is an inhabitant; *ibid*.

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An action against the inhabitants of a county for an injury sustained by their omission to repair a public bridge, can not be maintained.

(B) OF THE LIABILITY FOR INJURIES OCCASIONED BY THE NON-REPAIR.

RUSSELL V. THE MEN DWELLING IN THE COUNTY OF DEVON. M. T. 1781. K. B. 2 T. R. 667.

To an action against *the men dwelling in the county of D.* for an injury done to the plaintiff's waggon, in consequence of the bridge being out of repair, which ought to have been repaired by the county; two of the inhabitants for themselves and the rest in the county, demurred; when they insisted that by the laws of this kingdom no civil action can be maintained against the inhabitants of a county at large, for any injury sustained by an individual in consequence of a breach of their public duty, and that no instance could be found of any attempt to support such an action; and of this opinion was the Court, and observed that the action did not lie, for they were neither a corporation, nor *quasi* a corporation, nor have they any corporate fund out of which satisfaction can be made.

(C) OF THE DISTANCE TO WHICH THE LIABILITY TO REPAIR EXTENDS.

1. REX V. THE INHABITANTS OF THE WEST RIDING OF THE COUNTY OF YORK. T. T. 1806. K. B. 7 East. 588; S. C. 3 Smith. Rep. 467; S. C. Dom. Proc. 5 Taunt. 284; S. C. 2 Dow. 1.

The liability of any person or public body to repair a bridge is not confined to the bridge itself, but extends to the highway for 300 feet on both sides.

In this case Lord Ellenborough, C. J. after stating the pleadings and a special verdict which had been found, but which it is unnecessary to advert to here at more length, delivered judgment as follows. The single question on these pleadings is, whether the highway joined to a common bridge at each end thereof, for 300 feet, is of common right to be repaired by the inhabitants of the county at large; in other words, whether a different rule of law prevails with respect to the 300 feet of the road at each end of the bridge, from that which prevails with respect to the bridge itself. It is by the form of the pleadings admitted on the part of the defendants, that the repair of the bridge does at common law fall on the inhabitants of the county, and that the highway for 300 feet is subject to the same rule, inasmuch as they have pleaded not guilty, and have not stated that any persons are liable. That at common law the county is liable to the repairs of a public bridge, is clear; and after the case of the King v. the West Riding of Yorkshire, 5 Furr. 259. they cannot say that they ought not to be charged for the bridge itself; but they have endeavoured to separate the highway from the bridge itself. By the statute, however, the highway, for the limits of 300 feet at each end of the bridge, is dependent on the bridge as to its dimensions, and the repair of it is to be ordered in like manner. But it is said that there is no reason to construe the statute as declaratory of the common law in this respect, and that at least it introduces a new law with respect to the road at the ends of bridges. But there is not any thing in the statute which favours this construction; all its clauses coupling the bridge with the highway at the end of the bridge. The statute defines as to the 300 yards, what might otherwise remain indefinite as to the end of the bridges, and does not in other respects alter the common law. By the 22 H. 8. c. 5. it is enacted, that such part and portion of the highways, as well within franchises as without, as lie next adjoining to any ends of any bridges distant from any of the said ends by the space of 300 feet, shall be made, repaired, and amended, as often as need shall require; and the justices,

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or four of them, (I. Q.) shall have power to inquire, hear, and determine, in the general sessions, all manner of annoyances of and in such highways so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges, 300 feet, and to do in every thing concerning the making, repairing, and amending such highways, in as ample a manner as they may do for the making, repairing, and amending of bridges.

As fixed by statute.

2. REX V. THE INHABITANTS OF THE COUNTY OF DEVON. M. T. 1811, K. B. 14 East. 477.

The county of Devon is divided from the county of Dorset by the river Yarly, over which there is a bridge maintained by Dorset, the inhabitants of which in course, under the 25 H. 8. c. 5. maintained the road for 300 feet on the Devonshire side, from the bridge, as part of such bridge. At the distance of 150 feet from the bridge on the same side, the road about 30 years ago led through a ford occasioned by a small stream which runs into the Yarly; but about that time, in order to avoid the inconvenience of the ford, a smaller bridge was built over it by an individual, which having been generally used by the public ever since, was considered as having been adopted by the county. The smaller bridge having fallen into decay, and requiring repair, the inhabitants of Devon were called upon to repair it, which they objected to, on the ground that being within 300 feet of the former bridge over the Yarly, which were repairable by Dorset, the inhabitants of Devon were no more bound to repair the smaller bridge, than they were the road for that distance before that bridge was built, though lying within the limits of their country. Whereupon this indictment was preferred against them for the non-repair of the smaller bridge, and a verdict passed for the crown. And upon motion for a new trial, Lord Ellenborough, C. J. said, Each is a substantial bridge in a different county, and the new bridge cannot be considered as an appendage to the other. The statute of H. 8 attaches equally on the inhabitants of each county in respect to its own bridge. It makes no difference that the new bridge was first built by an individual, if it were afterwards adopted by the public as of great public utility. While it continued a road, it was repairable as part of the old bridge, but now that there is a substantial bridge built on the Devonshire side, it is repairable as a bridge by the inhabitants of the county in which it is situated, according to the statute. See 1 Burn. J. 377.

But the inhabitants of a county in which a new bridge was built within 300 feet of an old bridge, were held to be liable to repair such new bridge.

(D) OF THE MODE OF REPAIRING BRIDGES, AND DEFRAYING THE CHARGES INCIDENT THERETO.*

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OSMOND V. WIDDICOMBE. M. T. 1818. K. B. 2 B. & A. 49.

The question which arose in this case was, whether a bridge was a highway within the meaning of the 13 Geo. 3. c. 81. s. 60. by which carriages employed in carrying materials for the repair of any turnpike road or public highway, are exempted from toll. The Court held that a bridge did not come within the term highway used in the clause of exemption; the legislature having in general treated bridges and highways as distinct and separate subjects of legislative provision. If it had been therefore, intended to include bridges in this

Formerly a bridge was not a public highway within the meaning of the stat. 13 Geo. 3. c. 84. s. 60. exempting from tolls the carriage of materials necessary for its repairs.†

† But by the 3 Geo. 4, c. 126. s. 32. materials for the repairs of bridges carried along a turnpike road, are exempted from toll.

* By the 12 Geo. 2. c. 29 s. 1. the charges of repairing and amending bridges, and highways at the ends of bridges, shall be paid out of the general county rate.

The four justices in session, as aforesaid, may appoint two surveyors, with salaries, to see the bridges amended; 22 H. 8 c. 5; and 52. Geo. 3 c. 110.

And by 43. Geo. 8. c. 59. s. 1. it shall be lawful for the surveyor of bridges, and other public works, in every county appointed, or to be appointed by the justices at sessions holden for such county; and the said surveyor is hereby authorised to search for, take, and carry away, gravel, stone, sand, and other materials for the repair of such bridges and roads at the end thereof, as the inhabitants or counties are bound to repair, and to remove obstructions and annoyances from such bridges and roads, in the same manner as the surveyor or surveyors of any common highway within this kingdom is, or are by 13 Geo. 3. c. 78. authorised to do; and the several powers thereby vested in the surveyors of highways, are hereby vested in the surveyors of county bridges, and the roads at the end thereof as aforesaid; and the several penalties and other regulations in the said act contained, are hereby extended, as far as the same are applicable, to the surveyors under this act.

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exemption, one should have expected that, like turnpike roads and highways they would have been expressly mentioned. Not only however do the statutes in general treat highways, turnpike roads, and bridges, distinct in one instance alone, but in all cases they seem to have adhered to the same view of the sub-

And the right and property of all tools, implements, timber, bricks, stones, gravel, and other materials purchased, gotten, or had by, or by the order of justices in counties, or the surveyor of county bridges, for the time being, or in any respect belonging to such counties, shall be vested in such surveyor for the time being, in whom, upon any action or indictment being commenced or prosecuted, such property may be laid; sect. 3.

By the 43 Geo. 3 c. 59. it was enacted, "that where any bridge or roads at the ends thereof, repaired at the expense of any county, shall be narrow and inconvenient, it shall be lawful for the justices of any sessions, to order such bridge and roads to be widened, improved, and made commodious for the public; and where any bridge, repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down expedient, it shall be lawful for the said justices at any sessions, to order the same to be rebuilt, either on the old site or situation, or on any new one more convenient to the public, contiguous to, or within 200 yards of the former one, as to such justices shall seem meet;" sect. 2,

And if for the purpose of altering the situation, or of widening or enlarging any such bridge or bridges, road or roads, as aforesaid, it shall be necessary to purchase any land or ground, it shall be lawful for such county surveyor; by and under the direction of such justices, at their general quarter sessions as aforesaid, to ascertain the same, not exceeding in the whole one acre, at any one such bridge as aforesaid, and to contract and agree with the owner of such land and persons interested therein, for the purchase thereof, either by a sum in gross or by annual rent, at the option of such owner; and if such owner cannot be found, or the said surveyor cannot agree with him, the said justices in sessions shall impanel a jury, who shall assess the compensation for such land, and for the trespass and damage to be done by the execution of the powers of this act, in the same manner as they are authorised to do by the act of 13 Geo. 3 in relation to highways; and every clause, matter, and thing in the said act contained, and all other powers and provisions thereof, are hereby extended to the works by this act authorised to be done as far as the same are applicable, provided that no money shall be applied to the amendment or alteration of any such bridge, until presentment shall have been made of the insufficiency, or want of repair of such bridge, in pursuance of some or one of the statutes made and now in force concerning public bridges.

All orders and proceedings made and had within the county of York, relative to county bridges, shall in future be made and had by the justices of the respective ridings at the annual and general quarter sessions holden the first whole week after Easter, and at no other sessions, except at adjournments of the same, for the express purpose of carrying such orders into effect, provided that it shall be lawful for any two justices of the said ridings respectively, in cases of emergency, to give orders for temporary bridges, or such repairs as shall be necessary for the accommodation of the public; sect. 6.

The 54. Geo. 3. c. 90. recognises the previous statute of 43. Geo. 3. and proceeds thus, that "whereas doubts have been entertained whether the powers contained in the said act for the purchasing of any land or ground, do extend to the purchase of any building or buildings, or other erections." for remedy whereof be it enacted; "that all and every the powers and authorities in the said act mentioned and contained, for the purchase of any land or ground for the purposes of the said act, shall extend and be construed to extend to all such building or buildings, or other erections as may be necessary to be purchased for the purposes of the said act;" sect. 1.

And whereas it is expedient that the provisions of the said act, except as after mentioned should be extended to bridges repaired by the inhabitants of hundreds and other general divisions of counties, be it further enacted, "that the said act and all the powers and provisions thereof, (except such provisions therein as relate to bridges thereafter to be erected and built,) shall extend as well to bridges and the roads at the ends thereof, repaired by the inhabitants of hundreds and other general divisions in the nature of hundreds, as to bridges and the roads at the end thereof, repaired by the inhabitants of counties;" sec. 2.

The 55. Geo. 3 c. 147. recites that whereas, in and by an act made and passed in the forty-third year of the reign of his then present majesty, intituled "An Act for remedying certain defects in the Laws relative to the Building and Repairing of County Bridges, and other Works maintained at the expense of the inhabitants of counties in England," it is enacted, that it should be lawful to and for the surveyor of bridges and other public works in each and every county respectively, within that part of the united Kingdom called England, appointed or to be appointed by the justices at any general quarter session of the peace to be holden for such county, and the said surveyors were thereby authorised and empowered to search for, take, and carry away gravel, stone, sand and other materials, for the repair of certain bridges, therein mentioned, and roads at the ends thereof, being such as the inhabitants of counties are bound to repair, and to remove obstructions and an

ject; as for instance the statute 43 Geo. 3. c. 59. empowers the surveyors of bridges to get materials for the repair of bridges in the same manner as surveyors of highways under the act 13 Geo. 3. c. 78. Besides, it must be recollected that the damage done to a turnpike road from the carriage of materials for noyances, from such bridges and roads in such and the same manner as the surveyor or surveyors of any common highway within this kingdom, is or are (by an act passed in the thirteenth year of the reign of his then present majesty, instituted "An act to explain, Amend and reduce into one Act of Parliament, the Statutes now in being for the Amendment and preservation of the Public Highways," &c.) authorised to do; and the several powers and authorities thereby vested in the surveyors of highways, as well for the getting of materials as the preventing and removing of all nuisances from such bridges and roads should be, and the same was thereby vested in, the surveyors of county bridges, and the roads at the ends thereof, as aforesaid; and the several penalties, forfeitures, matters and things in the said act contained, relating to highways should be and the same were thereby extended and applied as far as the same are applicable to such bridges, and the roads at the end thereof as aforesaid, as fully and effectually as if the same and every part thereof were therein repeated and re-enacted; the surveyors making satisfaction and compensation for all trespass and damage done in the execution of the powers of that act, in such and the same manner as the surveyors of highways are required to make, in and by the said recited act; and whereas an act was made in the fifty-fourth year of the reign of his then present majesty, instituted, "An Act to explain and extend an Act for remedying defects in the Laws relative to the building and repairing of County Bridges, and other works maintained at the expense of the inhabitants of Counties in England, and for extending the said Act to Bridges and other Works maintained at the expense of hundreds," and whereas it is expedient that surveyors of county bridges, and other persons, being under contract for the rebuilding or repairing such bridges, or bridges repaired by the inhabitants of hundreds and other general divisions of counties in the nature of hundreds, should have a more extended power for procuring materials than is at present vested in such surveyors of county bridges, by the operation of the said first recited act, so far as relates to the procuring of stone for such purposes from quarries; and enacts "that from and after the passing of this act, it shall and may be lawful to and for every surveyor of such bridges, in each and every county within that part of the united kingdom called England, appointed or to be appointed by the justices at any general quarter sessions of the peace to be holden for such county, and also to and for the bridge master, or all and every person or persons, who may at the passing this act, or from and after the passing thereof, be under the contract for rebuilding or repairing of any public bridge, built or repaired at the expense of the inhabitants of any such county, hundred or general division as aforesaid; and such surveyor or surveyors, and also such other person or persons, are hereby authorised and empowered, with the consent and by the order of two justices of the peace acting for the county in which such bridge is intended to be re-built or repaired, first had and obtained for that purpose, to search for, work, dig, get and carry away, any stone in, from, or out of any quarry, or quarries whatsoever, with the county or counties to which such bridge may belong, other than and except such quarries as may be situated within a garden, yard, avenue to a house lawn, park, paddock, or inclosed plantation, or as may now or hereafter have ornamental timber trees growing thereon, without the license or consent of the owner or owners, of such quarry or quarries, as such surveyor or other person or persons shall judge necessary, for the rebuilding or repairing of such bridges respectively, provided such quarry or quarries shall have been worked within the last three years preceeding the time when such bridge shall be about to be rebuilt, or repaired; the said surveyor, or other person or persons making such satisfaction and recompence for the value of such stone, and also for the damage to be done to such quarry or quarries, by the getting and carrying away the same, as shall be agreed upon between him and them, and the owner, occupier, or other person interested in such quarry or quarries respectively; and in case they cannot agree, or such owner, occupier or other person interested shall refuse to treat, then and in every such case, the justices of the peace at their general or quarter session, or any two or more of them appointed for that purpose, fourteen days notice having been given to the owner or his agent of the intention to require a jury, shall cause the value of such stones, and amount of such stones, and amount of such damage, to be inquired into and ascertained by a jury of indifferent men, of the county, riding, division, city, town, liberty, or precinct wherein the same shall be situated; and to that end shall summon and call before such jury, and examine upon oath (which oath any two or more of such justices of the peace is and are hereby empowered to administer,) any person or persons whomsoever; and such justices of the peace, or any two of them, shall, by ordering a view or otherwise, use all ways and means for the information of themselves, and of such jury in the premises; and when such jury shall have inquired of and ascertained the value of such stones, and the amount of such damage shall be paid; which verdict or inquisition and order, shall be filed of record by the clerk of the peace, or other officer having the custody or the records of the said county, riding, division, city, town, liberty, or precinct, and shall be final and conclusive, to all intents and purposes whatsoever, against all parties and persons whom-

[712] the repair of bridges, would from the very nature of those materials be greater than that arising from the carriage of those necessary for the repairs of a

soever claiming or to claim in possession, remainder, reversion, or otherwise, their heirs, and successors, as well absent as present, infants, lunatics, idiots, and persons under coverture, or any other disability whatsoever, corporations, guardians, committees, husbands, trustees or attorneys, and any other person or persons whomsoever.

Sec. 2. And for the summoning and returning such juries, such justices of the peace, or any two of them, may issue their warrant to the sheriff or bailiff of any particular county, riding, division, city, town liberty, or precinct within the limits of which the quarry shall be situated, requiring him to impanel, summon and return an indifferent jury of 24 persons, qualified to serve on juries, to appear before the said justices at such time and place as in such warrant shall be appointed; and such sheriff is hereby required to impanel &c. such number of persons accordingly; and out of the persons so impanelled, &c. or out of such of them as shall appear upon such summons, the justices are hereby empowered and required to draw by ballot, and to swear or cause to be sworn, 12 men, who shall be the jury for the purposes aforesaid, and in default of a sufficient number of jurymen so returned, the said sheriff or bailiff shall take such other honest and indifferent men of the bystanders, or that can speedily be procured to attend that service, to make up the number of 12, and all persons concerned shall have their lawful challenges against any of the said jurymen; and the said justices of the peace shall have power from time to time to impose a fine or fines on such sheriff or bailiff, or his deputy or deputies making default in the premises, and on any of the persons who shall be summoned, and returned on such jury, and who shall not appear, or, appearing, shall refuse to be sworn on the said jury, or being sworn shall refuse to give or shall not give a verdict, or shall in any other manner wilfully neglect his or their duty therein, and also on any person who being summoned and required to give evidence before said jury, shall refuse or neglect to appear, or appearing, shall refuse to be sworn or to give evidence, so that no such fine be more than 10*l.* nor less than 20*s.* on any one person for one offence.

Sec. 3. And in case any jury shall give in and deliver a verdict for more money as the value of such stones and amount of such damage than what shall have been offered for the purchase thereof, by such surveyor, or other person or persons as aforesaid, the costs and expenses of summoning and maintaining the jury and witnesses shall be born and paid out of the rates to be collected within such county respectively; but if such jury shall give in and deliver a verdict for no more, or for less, then such costs and expenses shall be borne and paid by the persons with whom such controversy or dispute, touching the value of such stones and amount of such damage shall arise, and shall be levied by the warrant of one of the said justices, by distress and sale of the goods and chattels of the person or persons so made liable to the payment thereof.

Sec. 4. Provided that if any person shall think himself or herself aggrieved by any thing done or to be done, in pursuance of this act, such person may within the space of three calendar months next after the cause of complaint shall have arisen, appeal to the justices of the peace at any general quarter sessions of the peace to be holden for the limit wherein the cause of complaint shall arise; every such appellant first giving, or causing to be given, 14 days notice at least in writing, of his or her intention to bring such appeal, and of the cause or matter thereof, to the person or persons against whom such complaint shall be made, and within three days next, after such notice entering into a recognizance before some justice of the peace acting for the county wherein some cause of complaint shall arise, with two sufficient sureties conditioned to try such appeal, and to abide by the order of, and pay such costs as shall be awarded by the justices at such session, upon due proof of such notice, and of the entering into such recognizance, shall hear and finally determine every such appeal in a summary way, and make such award to the party appealing or appealed against, as the said justices shall think proper; and such determination shall be binding and conclusive to all intents and purposes.

And whereas many bridges on turnpike roads are by prescription at present liable to be repaired by certain parishes, and not by the county or counties in which they are situated and which bridges from change of time and circumstances, are become no longer sufficiently convenient, without being enlarged and improved, be it therefore further enacted that it shall be lawful for any such county or counties, parish or parishes respectively, to enter into a composition with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken, and lie upon the county or counties in which such bridge is locally situated; and that all rates made for carrying into effect any composition, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes whatsoever: 3 Geo. 4. c. 126. s. 107. And be it further enacted, that it shall be lawful for the trustees or commissioners of any turnpike road, and for such parish or parishes, in like manner, to enter into a composition with each other, and by the authority of the persons at present legally competent to make rates for such parish or parishes, whereby in consideration of such sum or sums of money, as shall be agreed upon, being

road, and so a heavier burden would be taken from the larger body, the inhabitants of the county, and thrown on the parishes or the trustees of the road.— [713]
Judgment for plaintiff. See 22 H. 8. c. 5.

(E) OF RESTRAINING THE REMOVAL OF BRIDGES.

REX V. THE JUSTICES OF DORSET AND OTHERS. E. T. 1812. K. B. 15 East. 594.

The justices of Dorset under the statute 43 Geo. 3. c. 59. contracted for the building of a new bridge on a different site in lieu of the old one which was ruinous. They directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge. This Court was applied to for a writ of prohibition to restrain the justices from pulling down the old before the new bridge was passable. But although there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a circuitous way in the interval, they refused to interfere, and said, if there were in use a clear known *festinum remedium* we might aid the applicants; but when the granting of a writ of prohibition in such a case as this would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the bridge be illegally pulled down, we do not feel ourselves called upon to apply any new remedy. But as a proof of the rectitude and propriety of the conduct of the parties acting in their official capacity, to defeat whose operations this claim is made, let us suppose that the bridge had been ordered to be built on the site of the old one. It would of course have been impossible in such a case to have kept the old one standing until the new one was finished. It may, therefore, be fairly inferred that the additional expense of providing all new materials for the new bridge cannot be thrown on the justices, because they have exercised the discretion given to them in changing it to another site. See 1 Mod. 76; 5 id. 143; 7 ed. 125; Skin. 625; Vent. 169; 1 B. & P. 105; 8 East. 225; Cald. 228; 11 Rep. 98.

(F) OF THE POWER OF A COURT LEET.

Bridges decayed, or out of repair, are presentable at the leet or torn; 2 [714]
Inst. 701.

(G) OF THE POWER OF JUSTICES AT SESSIONS.

1. By the 28 Hen. 8. c. 5. s. 1. the justices, or four of them at least, shall have power to inquire, hear, and determine in the general sessions, all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people; and to make such process and pains upon every presentment against such as ought to be charged to make or amend them, as the King's Bench usually doth, or as it shall seem, by their discretions, to be necessary and convenient, for the speedy amendment of such bridges. [715]

legally paid to the treasurer of the trustees or commissioners entering into such composition, out of the rates to be raised for the repair of the bridge or bridges the subject thereof the repairs of any such bridge shall, during the continuance of any act of parliament under which such trustees or commissioners shall be appointed or act be undertaken and carried on by the trustees or commissioners, and that all rates and assessments raised and levies for carrying such composition or agreement into effect, shall in like manner, be good and valid to all intents and purposes; see 4 Geo. 4 c. 126. s. 108.

* And where the bridge is in one shire, and the persons or lands which ought to be charged in another shire, or where the bridge is in the city or town corporate, and the person or lands that ought to be charged are out of the said city, the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do, if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is; 22 H. 8. c. 5. s. 5. By 52 Geo. 3. c. 110. reciting, that whereas by 12 Geo. 2. c. 29. "no part of the money to be raised and collected in pursuance of that act shall be applied to the repair of any bridges, gaols, prisons, or houses of correction, until presentments be made by the respective grand juries at the assize, great sessions, general gaol delivery, or general quarter sessions of the peace, held for any county, riding, division, city, town corporate, or liberty, of the insufficiency, inconvenience or want of reparations of their bridges, gaols, prisons, or houses of correc-

[716] But they cannot impose a second fine on the same parish for the not repairing.

And although the justices, at sessions may direct a compensation to be paid to the clerk of the peace for business

[717] done relating to the repair of bridges, they cannot order a gross sum to be paid to him without reference to the quantum of trouble he had.

2. **REX. v. INHABITANTS OF MACHYNLLETH AND PENEGOES.** E. T. 1821. K. B. 4 B. & A. 469. S. P. **REX. v. THE INHABITANTS OF OLD MALTON, YORKSHIRE.** Summer Assizes, 9th August, 1790. Cor. Lawrence, J. MSS. Cited by Holroyd, J. id. 470. n.

The Court, in this case, decided, that where a fine had been once imposed upon the inhabitants of a township and parish, against whom a presentment had been made for not repairing a bridge, that the court of quarter sessions had no power or jurisdiction to impose a second fine.

See 1 Salk. 356; 6 Mod. 163; 1 Hawk. c. 76. s. 94.

3. **REX. v. HOULDRIDGE.** H. T. 1818 K. B. 1 B. & A. 312.

The sessions ordered payment by a bridgemaister, to the clerk of the peace of a per centage on all money raised for the repair of a bridge in a particular district, in lieu of all his fees for indictments, presentments, &c. for bridges within it. The order was removed by *certiorari* into this court, when a rule was obtained to show cause why it should not be quashed. It appeared that such percentage was claimed as an ancient fee, and had been paid, without dispute, for a long period of time. After cause shown, the Court said, wherever a duty is imposed on a county, and where, cases incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence over the county purse have necessarily a right to defray such expenses out of the county stock.

In this case they had full jurisdiction over the subject matter; but without looking to the form of the order, as directing the bridge-master to pay this money absolutely, and not out of such funds as may, at the time, be in his hands, we must make the rule absolute for quashing the order of sessions, on the ground that they had no right to order a substituted sum to be paid in lieu of a compensation for the business done by the clerk of the peace, to award a sort of average computation, instead of taking the items of his bill *divisim*, and thereby to follow a mode of calculation, without any reference to the *quantum* of business done, or the trouble the party might be put to, or at best, to adopt a species of *modus* which cannot attach; and that "when any public bridges, ramparts, banks, or cops, or other works, are to be repaired at the expence of any county, city, &c." it shall and may be lawful, to and for the justices of the peace, at their general or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment be made as aforesaid of the want of reparation of such bridges, ramparts, banks, or cops, to contract and agree with any person or persons, for rebuilding, repairing, and amending of such bridges ramparts, banks, or cops, as shall be within their respective counties, &c.; "and all other works which are to be repaired and done by assessment, on the respective counties, &c." for any term or terms of years not exceeding seven years, at a certain annual rent, payment, or allowance for the same; such contractor giving sufficient security for the due performance thereof to the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty; and that such justices at their respective general or quarter sessions, shall give public notice of their intention of contracting for rebuilding, repairing, and amending the bridges, ramparts, banks or cops, and other works aforesaid, and that such contracts shall be made at the most reasonable price which shall be proposed by such contractors respectively, and that all contracts when agreed to, and all orders relating thereto, shall be entered in a book, to be kept by the respective clerk of the peace for the time being, or the town clerk high bailiff, or chief officer of any city, town corporate, or liberty for that purpose, who is and are hereby required to keep them amongst the records of such county, &c." to be from time to time inspected at all seasonable times by any of the said justices within the limits of their commissions and by any person or persons employed or to be employed by any parish, township, or place contributing to the purposes of this act, without fee or reward; and whereas great expense in the repairs of county bridges, ramparts, banks, cops, and other works appertaining to the same, and of the roads over the same, and of so much of the roads at the ends thereof, as by law is to be repaired at the expense of any county, riding, &c." "and great inconvenience to the public may be often in a great measure prevented by timely and immediate repair of any inconsiderable damage, injury, defect or sudden want of repair or amendment of the same, without the delay which must generally arise from the necessity imposed by the aforesaid act, of a presentment by the grand jury, at the assize, great sessions, or general or quarter sessions of the peace held for any county, city, &c." "of the want of reparation of the same; by means of which delay, the aforesaid want of repair is often very much increased, to the great expense of the county, and great inconvenience of the public; and whereas it is also expedient that the justices of the

this time of day, be supported; considering that before the late statute, connected with the subject before us, the magistrates could not order repairs beyond the amount of 20*l.*, to be done to any county hundred bridge, without a previous indictment or presentment; whereas, since that act, they may without indictment, order repairs to any extent; so that, were such a *modus* tenable, it would create the utmost hardship, as the labour of the clerk of the peace is now thereby greatly abridged. See 12 Geo. 2 c. 29. s. 1; 52 Geo. 3. c. 110; 55 Geo. 3. c. 143. s. 5; 4 T. R. 591. [718]

4. *REX V. THE WEST RIDING OF YORKSHIRE. E. T. 1773. K. B. Loft. 239.*

Per Lord Mansfield, C. J. The power given to the justices of the peace to hear and determine indictments respecting bridges, does not take away the superintending power of the Court of K. B. See 2 Inst. 701.

peace of any county, city, &c. at their general quarter sessions respectively, before any presentment shall have been made as aforesaid, as directed by the aforesaid act, of the want of repair of such roads, should be enabled without any such presentment to contract and agree with certain persons hereinafter mentioned, for the repairing and amending of the same, and also for keeping the same in repair when so repaired and amended; it is enacted, "that it shall and may be lawful for the justices of the peace of any county, city," &c. at their general quarter sessions or great sessions respectively, to be holden in the week next after the clause of Easter. or the great part of them then and there assembled, to appoint annually two or more justices acting in and for any division of justices in such county, city, &c. in or near which any county bridge, or any bridge which is in part a county bridge, ramparts, banks, cops, or other works appertaining to the same, or any part or parts thereof, or the roads over the same, or so much of the roads at the ends thereof as by law is to be repaired at the expence of any county, city," &c. "shall be situate to superintend the same: and whenever it shall appear on their own inspection to be necessary, for the purpose of preventing the further decay and injury of the same, to order any immediate repairs or amendments to be done to the same, or to any part thereof; but it shall and may be lawful for any two justices so to be appointed as aforesaid, by a written order signed by their hands respectively. to order such immediate repairs to be done by such person as to them shall seem fit;" provided, that in no case the sum to be expended by them in such repairs shall exceed the sum of 20*l.* and further, that such appointment of justices as aforesaid shall remain in force until one week after the following Easter sessions respectively; and that in case of the death of, or removal of or refusal to act by any such justice so appointed as aforesaid, the said court of general quarter sessions or great sessions, in any at any other of the four quarterly sessions appoint any other justice to act for the remainder of the then current year, in the place of any such justice so dying removing, or refusing to act as aforesaid.

The power of sessions does not interfere with the jurisdiction of the court of B. R.

Sect. 2. The justices of the peace of any county, city, &c. at the general quarter sessions or great sessions which shall next happen after such repairs so ordered to be made by such justices so appointed as aforesaid shall be completed, or the greater part of them, then and there assembled, "may" order the payment of such sum or sums of money not exceeding 10*l.* as shall be sufficient to pay for such repairs, to be made out of the county rate to such persons who shall have so repaired the same, by such order of such justices as aforesaid, although no presentment shall have been made by any grand jury at the assize, great sessions or general quarter sessions of the peace of any county, city, &c. "in which such repairs shall have been done, or the want of such reparation, as by the said" 12 Geo. 2. was directed; "provided, nevertheless, that before such payment be ordered to be made as aforesaid, a certificate be returned to such justices so assembled at such last mentioned sessions, signed by two at least of such justices so appointed as aforesaid, who shall have so ordered such repairs as aforesaid, stating the nature of such repairs, and the defects, damage, or injuries which they had so ordered to be repaired, and their reason for so ordering such immediate repairs as aforesaid, provided also that such justices so assembled as last aforesaid be satisfied by the parties concerned, that the charges made by them for such repairs are reasonable and just.

Sect. 5. After July 1, 1812, "it shall and may be lawful for the justices of the peace of any county, city, &c. at their general quarter sessions respectively, or the greater part of them then and there assembled, if they shall think proper and convenient, to contract and agree with the commissioner or trustee of any turnpike road within the said county, &c. or with their surveyor or clerk, or with both their surveyor and clerk, or with the surveyor or surveyors of the highway of any parish, place, or tithing within the said county, &c. respectively, or with any other person for the maintaining and keeping in repair roads over any county bridges, and of so much of the roads at the ending thereof as by law is to be repaired at the expence of any such county, &c. or any part of the same, for any term not exceeding seven years, nor less than one, although no presentment shall have been made as directed by the said" 12 Geo. 2. "of the insufficiency, inconveniency, decay, or want of repair of the same, subject, however, to all the rules," &c. required by the said 12 Geo. 2. "in case where the same shall have been presented or directed by that act."

(II) OF THE PRESENTMENT.

In presentments by the grand jury, there is no occasion to show who ought to repair; it is sufficient if the defect be shown, and the bridge stated to be public.

REX v. THE INHABITANTS OF MIDDLESEX, M. T. 1738. K. B. Andr. 285.

The only question before the Court was, whether it is necessary, upon the statutes of 22 H. 8. C. 5. and 1 Anne, sess. 1. c. 18. for the jury to present by whom the bridge ought to be repaired, this order only mentioning, that it was presented to be a public bridge out of repair. And the Court said, Although the statute of Anne, on which the present question depends, is in the conjunctive, that upon due presentment, &c. that any bridge, &c. is out of repair &c., and which hath usually been repaired, by them &c., yet this latter part of the sentence is to be construed independent of the former, and is a declaration of what bridges, &c. the justices shall have cognizance, viz. of such as the justices at sessions have heretofore directed the reparation of; and thus they have a better and easier way of coming to the knowledge of them by presentment of a grand jury. So that the only matter necessary to be presented is, that it is a public bridge within the county, and out of repair. The advice given by Lord Coke, in 2 Inst. is certainly very good, that an inquiry ought to be made by the grand jury.

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(1) OF THE INDICTMENT, AND PROCEEDINGS INCIDENT THERETO. *

(a) *What the indictment must state.*

1. REX v. SAINTHILL. T. T. 1705. K. B. 2 Ld. Raym. 1174; S. C. 1 Salk. 359; S. C. 6 Mod. 255. S. P. REX v. SPILLER. T. T. 1625. K. B. Styles. 108.

The indictment must show what kind of bridge it is which is charged as being in decay, whether for horses, carriages, or foot passengers only, though it need not state that the bridge is in the king's highway; so stating as a breach that the western part of the

This was a writ of error on a judgment given at the sessions, upon an indictment for not repairing a bridge. The indictment set forth; *quod* the defendant, with *et armis apud B. &c. occidentalem partem ejusdam communis pontis pedalis communiter vocati L. sciutali super rivum de Calme, in quadam communi semita pedali ibidem ducente a B. usque H. ac continentem in, se dimidium ejusdem pontis tam ruinosa contractam et in decasu esse permisit ob defectum reparationis et emendationis ejusdem partis, ita quod ratione inde legi subditi dictæ domine reginæ in, per, et super pontem predictum ire, transire, seu*

And by stat. 55 Geo. 3. c. 143 s. 5. reciting, that whereas it is expedient that the powers contained in an act passed in the 43 Geo. 3. for authorizing the justices of the peace of any county, &c., at their general quarter sessions, to contract for maintaining and keeping in repair roads over county bridges, and so much of the roads at the ending thereof as by law is to be repaired at the expence of counties, although no presentment shall have been made of the want of repair, as directed by an act passed in 12 Geo. 2. intitled, "An Act for the more easy Assessing, Collecting, and Levying of County Rates," should be extended to the bridges as well as to the roads at the end thereof; it is enacted, that "it shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their general quarter sessions respectively, to contract and agree, or to authorise any other person or persons to contract and agree, with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the road at the ends thereof as are by law liable to be repaired at the expence of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for, and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof,) by the treasurer of the county out of the county rate, or (in cases where the hundred is liable to the repair of the same) by the bridge master (or other public officer charged with the repair of bridges,) of the hundred by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same shall have been made, and although no public notice shall have been given by the said justices at their respective general or quarter sessions, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said act of 12 Geo. 2.: provided, nevertheless, that before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract."

* When the liability to repair rests upon the county at large, in order to expedite the proceedings, any persons who reside within it may be made defendants, and be compelled to pay the whole fine which the Court may assess, and they will be forced to resort to their remedy at law, in order, by a contribution, to obtain remuneration from the county; Hawk. b. 1. c. 77. s. 3.

laborare, prout debent et solebant sine magno periculo non possunt ad grave damnum et commune nocumentum eorundem subditorum et ligearum, ac contra pacem, &c. et juratores prædicti ulterius presentant, quod the defendant ratione tenuræ, &c. reparare debet et solebat. This cause came before the Court twice, when two exceptions were taken; 1st. That it did not appear to be a bridge in a common highway, as it ought, but it was only in *communi semita*; for the statute of 22 Hen. 8 c. 5. which gives the jurisdiction to the justices of peace, in their sessions, in case of nuisances of bridges, is confined by the words to bridges on the highway; and so Lord Coke holds in his exposition upon the statute, 2 Inst. 707., and therefore he says, the indictments upon the statute are, *quod pons publicus et communis situs in alta regis via super flumen, seu cursum aquæ, &c.* and, agreeable to this are the precedents in West. 119. 156. 157. And 2dly, that this indictment, in assigning the defect of reparations was too general, being only *occidentalem partem*; whereas it ought to have been, that so many feet in length, and so many in breadth, were *ruinos* &c.; and cited 2 Rol. 81. n. 16. 17 that an indictment for stopping *quandam partem regie viæ apud K.* naught, for want of saying what part, as so many feet in length, and so many in breadth, &c. So an indictment for stopping *quandam partem regie viæ continentem per æstimationem*, so many feet in length, and so many in breath, naught for the uncertainty of *per æstimationem*. To which it was made answer, 1st. that this must be taken to be a bridge in common highway, because it is said to be *communis pons*; and by reason of its being out of repair, *ligei subditi dictæ dominæ reginæ*, could not pass *prout debent et solebant*. 3dly, That there was a *communis strata*, which was not the queen's highway; as Co. Lit. 56. a; and that no action lies for a nuisance in such a way, but only an indictment; and that the way in question must be taken to be such that the justices had no original power of inquiring into nuisances by their first creation by the statute of Edw. 3. before the statute of 22 H. 8. That in West's Precedents, 156. sect. 346. there was an indictment, that was only that *communis pons apud, &c. adeo confractus*. &c.

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As to the second exception, the Court overruled it upon the first argument and held that it being laid *continentem in, &c. dimidium ejusdem pontis*, that made the *occidentalem partem* certain enough, for it is half the bridge, be that half more or less. As to the first, the Court seemed to think it a good exception, and that it ought to have been in *semita communi pro omnibus legibus dominæ reginæ*; and if that had been so, they agreed it would have been well; for that the bridge need not be laid to be in *alta regia via*. Subsequently the Court held the indictment naught, because it was *pons pedalis*, which signifies a bridge of a foot long, instead of *pædstris*. And so it does not appear what sort of bridge it is; whether a bridge for carts and carriages, or for horses, or for foot-men only which is necessary to be shown. And the case in Styles. 103. the King v. Spiller, was mentioned, where it was allowed to be a good exception to an indictment for not repairing a bridge, because it did not show whether the bridge were a cart bridge, or a horse bridge, or a foot bridge, or what passage was over it. As for the exception to *communis semita*, they held it was well enough; and they remembered the case of the king v. Thrower, in my Lord Hale's time, 1 Vent. 203; 3 Keb. 33; where an indictment was for stopping *communem viam pædestrem ad ecclesiam de Whitby*, and the indictment was held to be good, for it should be taken to be a common footway, and that the church was only the *terminus ad quem*. And Styles. 103. exception taken, that it does not show the bridge is in the highway, and overruled; because it says it is a common bridge, which is enough, and it is needless to say it is in the highway. But the Court did not, at that time, reverse the judgment, though they subsequently did.

2. BRIDGES v. NICHOLS. T. T. 1622. K. B. Godb. 146.

Indictment was *debent & solent reparare pontem* &c. It was moved that the indictment was insufficient, because it is not alleged in the indictment that the bridge was over a water, and needful that it be amended; 2dly, it did not appear in the indictment, that at the time of the indictment the said bridge was bound to

So it need not state the bridge to be over water, but it must state that the party is bound to

reparatio rationis tenura, and that the same is out of repair at reason of his tenure, or it is out of repair at reason of a common; and for these the time of errors the indictment was quashed by judgment of the Court.

REX V. KERRISON. E. T. 1813. K. B. 1 M. & S. 435.

Judgment had been given against defendant for not repairing a bridge. Error was now brought to reverse it, when it was argued that the indictment, upon which the defendant had been charged with such a duty, stated, that he was bound to repair by reason of his being owner and proprietor of a certain navigation, which was not equivalent to charging him with *ratione tenuræ*; which, according to all the established principles of law, as applicable to the statute of bridges, was the only legitimate mode by which an individual could be responsible that the expression *ratione tenuræ* had become a known term of art, which, like other terms of art, had its own peculiar meaning, and must have been at first adopted in lieu of a more definite form of pleading a prescription obligatory; that these words, by the technical sense which had been given to them, embodied the condition upon which the land was granted; that the words used in the indictment before the Court, imported only estate and quantity of interest, but did not aver, that any such condition as repairing the bridge was attached to the property; that, therefore, the allegation being simply by reason of his being owner and proprietor, the verdict could not be sustained. The Court acquiesced in the priority of what had been contended, upon two grounds; 1st, that under the allegation of *ratione tenuræ*, evidence must have been given to show, that the land, or property, was held by the service of repairing the bridge; whereas the form adopted in the indictment, upon which the defendant had been adjudged responsible to repair, would have been satisfied by proof of the defendant being owner of the navigation; and, 2dly, that even allowing that such an apparent distinction, between the import of the two expressions under discussion, could not be drawn, and that a doubt existed in their minds, they would be entitled to have reversed the judgment, on the ground that public convenience required that the ancient forms of alleging obligations, and of pleading, should be adhered to, in order to charge an individual with such liability as the present, and that no fanciful forms should be substituted in lieu of them. Judgment reversed. See 2 Id. Raym. 792, 801; 2 Inst. 709; Styles. 209; 2 Saund. 160; 13 East. 320; 14 id. 317.

4. REX V. KERRISON. E. T. 1813. K. B. 1 M. & S. 435.

Error to reverse a judgment on an indictment given by the justices at the quarter sessions for the county of Norfolk, against the defendant for not repairing a common bridge. The indictment stated that a certain common and public bridge over a navigable cut, channel, canal, or watercourse, in the parish of Ditchingham, in the county of Norfolk, in a certain high way there was, and yet it is in decay, &c. and that the defendant, by reason of his being the owner and proprietor of the navigation mentioned in a certain act of parliament, made in the 22d year of the reign of Car. 2. entitled "An Act for making navigable the Rivers commonly called Brandon and Waveney," ought to repair and amend the said common bridge, &c. The counsel in support of the writ of error, took this objection, that the act of parliament being a private act, should have been set forth, as the Court could not take judicial notice of it. The judgment was, however, reversed on another ground.

5. REX V. THE INHABITANTS OF MACHYNLETH AND PENNEGOES. T. T. 1823.

K. B. 2 B. & C. 106.

An indictment stated that an ancient bridge, situate within the parishes of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes and town of Macynlleth aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges. The defendants, viz. E. F., of the said parish of Pennegoes, and G. H., of the said

And an indictment alleging that a bridge within the parishes of A. and B.

town of Machynlleth, two of the inhabitants of the said parish of Pennegoes was out of and the town of Machynlleth, as appeared from the record of the case at the repair, and quarter sessions, came into court, and pleaded not guilty. They were, however, found guilty; and this was a writ of error upon the judgment there recorded. The following error was assigned; "that it was not alleged in the indictment that any part of the bridge was within the town, or that the inhabitants of the parish of Pennegoes and the inhabitants of the town of Machynlleth were a body corporate;" and it was contended that the indictment could not, therefore, be supported, because it not appearing that the bridge was situate within the town, the inhabitants of the town were not liable, unless a special consideration were shown, which was not the case, for not being described as, and proved to be, a body corporate, they could not hold lands, And although it was urged that this indictment charged that the bridge was situate within the two parishes, and then that the inhabitants of the parish, and the inhabitants of the town of Machynlleth *after said*, have been used to repair; and that, therefore, as there was no other Machynlleth mentioned before but the parish, the word *aforsaid* must refer to the parish of Machynlleth, and the word town must be rejected as surplusage: The Court reversed the judgment, and said, The bridge is described as situate within the parishes of Machynlleth and Pennegoes. But the parishes are not alleged to be within the town; and the case of the King v. the inhabitants of St. Giles Cambridge, (5 M. & S. 260.) is an authority to show, that in order to charge a township for the repairs of a road, situate out of the township, a consideration must be shown. Here that is attempted to be shown by alleging that the inhabitants of the parish and the town were liable by reason of the tenure of certain lands; but, as inhabitants, they could not hold lands, and it is not shown that they are incorporated. The consideration failing, and no common law liability being established by reason of a joint tenure of lands, even could the word town be rejected as surplusage according to the argument, which, if it were, would throw this difficulty in the way, that it would not appear upon the record that any person came to defend for the parish of Machynlleth, the judgment cannot be supported. See 3 East. 41; 3 T. R. 513; Peake, N. P. C. 219. 12 Co. Rep. 121; 1 Ld Raym. 689; 1 Salk. 191; 2 Hale's P. C. 174; Hawkins. P. C. b. 2. c. 25 s. 89; Viner's Abridgment, Corporation, E.

(b) *Of the pleas.*

1. *REX V. THE INHABITANTS OF THE WEST RIDING OF THE COUNTY OF YORK.* T. T. 1806. K. B. 7 East. 588; S. C. 3 Smith. Rep. 467. S. P. *THE KING V. THE INHABITANTS OF THE COUNTY OF BEDFORD.* H. T. 1810. K. B. 12 East. 192. S. P. *REX V. THE INHABITANTS OF NOTTINGHAM.* T. T. 1674. K. B. 2 Lev. 112.

This was an indictment for not repairing a highway. A special verdict was found. The indictment alleged that a certain part of the highway at the township of Quick, in the west riding, &c. to wit, a certain part thereof lying next adjoining the west end of a certain public bridge there, called Tamewater Bridge, and within the distance of 300 feet thereof, &c. was and yet is very ruinous, &c. and that the inhabitants of the west riding of, &c. of right ought to repair, &c. Plea, not guilty. The evidence (as far as it is material to this point) was, that the township of Quick lay in the parish of Saddleworth, in the said riding, which parish had been immemorially divided into four districts, called mears, in one of which mears, called Shaw Mears, the highway in Quick lay, and that the 300 feet at the other end of the bridge lay in another mear, and that each mear had respectively repaired the said respective highway.

* But it seems, from analogy to the case of highways, that this rule is to be understood as only applicable to indictments against the county, and not against individuals or bodies corporate, who are not of common right bound to repair, because it lies on the prosecutor specially to state the grounds on which the latter are amenable; and therefore they may negative their liability under the general issue; see 2 Saund. 159. n. 10; and it may be observed generally, that the pleas and evidence are the same, *mutatis mutandis*, with the pleas and evidence in the case of an indictment for not repairing a highway; see post, tit. Highway.

ways, &c. The main argument was upon the liability of the county to repair these ends of 300 feet each, in the same manner as they were liable to repair the bridge. This was decided in the affirmative; but in arguing, it was said by Mr. Holroyd, who was counsel for the crown, and not contradicted by the Court, that no question could arise as to any special liability of the respective mears, because the general issue only was pleaded; and any question of that sort, he said, could only be raised by a special plea. He cited *Rex v. the city of Norwich*, 1 Stra. 180. 2. The counsel for the defendants argued against this, upon the principle of assuming that these ends were highways, and not parts of the bridge. This, however, the Court overruled.

2. *REX V. THE INHABITANTS OF THE COUNTY OF NORTHAMPTON.* H. T. 1814. K. B. 2 M. & S. 262.

Though evidence that particular individuals have been accustomed to repair, is admissible. [723]

Plea of not guilty to an indictment against the inhabitants of the county of N. for not repairing a public bridge. It was contended, upon evidence being offered to show that the feoffees of certain estates had repaired the bridge, and that such proof was inadmissible to negative the fact of the bridge being a public one. Such proof was accordingly rejected at the trial; but upon a rule nisi, which had been obtained for a new one, now coming before the Court, they said, it was for the prosecutor to show the bridge a public one; and the defendants had a right to give every species of evidence to show the contrary. One medium of proof was to show that it had been repaired by individuals, though that alone would be of very little weight; nevertheless, upon the *summum jus*, the evidence is admissible. The rule must be, therefore, made absolute.

THE KING V. THE INHABITANTS OF NORWICH. H. T. 1719. K. B. 1 Stra. 180. more fully abridged, *post*.

So under the plea of not guilty, they who are not liable to repair of common right may discharge themselves.

To an information against the inhabitants of Norwich, for not repairing public bridges, the inhabitants pleaded not guilty. It was objected, that the defendants having pleaded the general issue, could give nothing in evidence but that the bridges were in repair. To this it was answered, that, as a general proposition, the argument might be correct, because *prima facie* the inhabitants are chargeable; and, if they would exonerate themselves, must do it by special pleas, and not avail themselves of it under the general issue. But these defendants were not chargeable *de communi jure*, but the county was; so that they are not obliged to find out who ought to repair, as they are compellable to do when *prima facie* the charge lies upon them.

Per Cur. It is clear, that those who are not chargeable of common right may discharge themselves on *not guilty*. And, under that plea, the defendant may controvert every thing the prosecutor is bound to prove. If a man would discharge himself on a particular account, he must plead it specially; but not where the common right is his defence. If a man is charged to repair by reason of the tenure, he may throw it on the parish by the general issue.

See ante, 722. n.

4. *REX V. THE INHABITANTS OF ESSEX.* T. T. 1679. K. B. T. Raym. 384.

A plea describing a bridge to be in the parish of A. where it appears from the indictment to be in B. also, is bad on demurrer.

Information against the inhabitants of Essex for not repairing a stone bridge, called D. Bridge, in the several parishes of H. and D. The defendants plead that they ought not to be charged, &c.; for that by an inquisition taken at Chelmsford, August the 3rd, 26 Car. 2. before Sir M. H. and T. and others, justices of oyer and terminer, it was presented that a certain bridge, commonly called D. Bridge, lying, &c. in *parochia de D.*, &c. was then in decay, and that Sir F. F. ought to repair it *ratione tenuræ*, who pleaded that he ought not to repair the said bridge *ratione tenuræ*, but that the inhabitants of D. ought to repair it; upon which a trial was had, and the jury found that Sir T. ought to repair it, and judgment against him; and the defendants aver the bridge to be the same, and that the judgment was still in force; and upon demurrer, it was objected, that the bridge laid in the information was in two parishes, viz. in H. and D., but the bridge in the defendants' plea was only in D., so it could not be the same bridge; for Sir F. F. may be obliged to repair so much of the bridge as was in D., and the county the other part, which lies in

II.; and judgment was given for the king.

5. *REX V. THE INHABITANTS OF OXFORDSHIRE*. M. T. 1812. K. B. 16 East. 223.

Indictment against a county for not repairing a bridge. Plea, that A. B. is liable *ratione tenuræ*. Evidence was adduced to show that the estate of a A. B. was part of a larger estate, which part A. B. purchased of C. D., the former owner, who retained the rest in his own hands, and, as well before the purchase as since, repaired the bridge. The judge was of opinion that C. D. was liable in respect of the portion which he retained; yet a verdict was given against the county. Motion for a new trial, or for a stay of judgment until another indictment was tried. But the Court holding that the plea was not supported by the proof, there being no evidence that A. B., and those who formerly had the estate of A. B. (viz. C. D.) had repaired, for it appeared, that subsequently to the alienation of the property, another person, viz. C. D. had repaired; observing, that even allowing that A. B. was liable *pro rata*, the plea should have been framed thus; "that A. B., and those whose estate he has, *with others*, had repaired," directed that the rule should be drawn up for staying the judgment upon payment of the costs of the prosecution.

(c) *Of the evidence.*

On an indictment against a county for not repairing a bridge, the prosecutor must prove that it is a public bridge; see *ante*, p. 696. that it is situate within the county, and that it is out of repair. So, on indictment against individuals, the prosecutor must prove the defendant's liability to repair, consistently with the facts and circumstances alleged in the indictment.

(d) *Of the witnesses.*

By 1 Anne. s. 1 c. 18. on the trial of informations or indictments, the evidence of the inhabitants of the town, corporation, county, riding, or division in which the decayed bridge or highway lies, shall be admitted; S. P. 6 Mod. 307.

(e) *Of the trial.*

1. *REGINA V. THE INHABITANTS OF WILTS*. M. T. 1704. K. B. 6 Mod. 307.

Per Cur. Although an inhabitant of the county is a competent witness, he is not a good juror.

So as this matter concerns the county at large, the trial, upon a proper suggestion, shall take place in any other county next adjacent, and the venue shall come from thence. See 2 Burr. 859.

2. *REX V. THE INHABITANTS OF NORWICH*. E. T. 1718. K. B. 1 Stra. 177.

An information for not repairing three public bridges, lying within the county of the city of Norwich, leading from the Market Cross to Ipswich, set out that they were out of repair, and that it could not be found that any person or body politic was bound by tenure or otherwise to repair them, and therefore the inhabitants of the county of the city were bound; notwithstanding which, they have not repaired them, but suffer them to continue in decay. Not guilty was pleaded by two of the inhabitants of the city and county of the city, in the name of all the rest; and the record then noticed, by way of suggestion, that the question, &c. was between the citizens of Norwich and the inhabitants of the county of Norfolk; and they being interested, there could be no indifferent trial had there, and Suffolk being the next county, the *venire* was awarded thither; and on the trial, the jury gave a special verdict, viz. that the city of Norwich is an ancient city, and has been time out of mind a county of itself, distinct from the county of Norfolk; that the three bridges were, at the time of making statute 22 Hen. 8. c. 5., within the county of Norfolk, and not within the county of the city of Norwich. The Court held that the trial was well had in Suffolk.—Judgment for the crown.

(f) *Of the removal of the indictment.*

1. By the 1st of Anne, s. 1. c. 13. no presentment or indictment for not repairing bridges, or highways at the ends of bridges, shall be removed by *certiorari* out of the county into another county.

2. *REX V. THE INHABITANTS OF CUMBERLAND*. H. T. 1795. K. B. 6 T. R. 194; S. C. In error, 3 B. & P. 354.

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A plea charging a party with being bound to repair a bridge *ratione tenuræ* is not sustained by evidence that the property was parcel of an estate possessed by another, who it appeared had been so bound, and actually continued the repair subsequent to the partial alienation of such estate.

An inhabitant of the county is a competent witness. An inhabitant of the county can not be a juror. And the trial may be in the next county.

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And where the bridge lies within the county of a city, and the point in dispute is, whether the inhabitants of the city or county at large ought to repair, the *venire* on a proper suggestion will be awarded in to the county adjacent to the larger division.

The statute 1 Anne. prohibiting the removal of an indictment by *certiorari* out of the county.

Only applies to the defendant, not to the prosecutor.

[726] Nor to cases where private persons are charged to repair.

The Court being in all cases reluctant to stay judgment on an indictment for not repairing a bridge, will never do it longer than to give a reasonable time for the trial of another indictment.

The question in this case was, whether an indictment for not repairing a bridge could be removed by *certiorari*? To show that it could not, the defendants relied on the above statute; but the prosecutor urged, that it was intended only to prevent *defendants* removing such presentments or indictments, and did not take away the *certiorari* from the *prosecutor*. And of that opinion was the Court, who observed, that if it were otherwise, it would be an anomalous case in the law of England, for that in these cases the defendants are the inhabitants of a county; and if the indictment cannot be removed by *certiorari*, they must be tried by the very persons who are parties to the cause. This case afterwards came on, by writ of error, before the House of Lords, where the judgment was affirmed.

3. REX V. THE INHABITANTS OF HAMWORTH. E. T. 1731. K. B. 2 Stra. 900.

On a motion to quash a *certiorari*, to remove an indictment against the defendants at the sessions, for not repairing a bridge, it was insisted, that by stat. 1 Anne. c. 18. the *certiorari* was taken away. To which it was answered, and resolved by the Court, that this act extends only to bridges where the county is charged to repair; and that where a private person, or parish, is charged, and the right may come in question, the stat. 5 & 6 W. & M. c. 11. had allowed the granting a *certiorari*; and therefore the Court refused to quash the writ.

(α) *Of the judgment.**

REX V. THE INHABITANTS OF THE COUNTY OF SOUTHAMPTON. E. T. 1818. K. B. 2 Chit. Rep. 215.

A motion was now made to set aside a verdict for the crown, obtained on an indictment against the county of Southampton, for not repairing a bridge. There was a plea, that the Marquis of Buckingham was liable. The motion was, either for a new trial, or judgment to be stayed till the event of a trial with the Marquis could be ascertained. Affidavits were produced that new evidence had been obtained since the trial. *Per Cur.* As this judgment may be binding for ever on the county, we will suspend it, but not generally, only till we shall make further order; and we expect that, in the meantime, all reasonable speed be used to try the question with the Marquis of Buckingham, and that it be brought to a conclusion with as much expedition as the case will admit of. And in case it is not so, we shall direct judgment to be entered up upon the present verdict.—Rule *nisi* for staying judgment on these terms.

(J) OF THE INFORMATION.

An information lies against an individual, or public body, to compel him or them to repair a bridge; see T. Raym. 584; 8 Mod. 120; 2 Lev. 112; 6 Mod. 190.

V. RELATIVE TO INJURING BRIDGES. See *ante*, div. Relative to Ownership in the materials, p. 696; and *post*, 727. the 3 Geo. 4. c. 126, sec. 121.

VI. RELATIVE TO DESTROYING BRIDGES.

[727] Penalty for injuring or destroying bridge.†

The 13 Geo. 3. c. 84. after reciting that evil-disposed persons do, or may break, damage, or throw down the stones, bricks, or wood upon the parapets or battlements of bridges, enacts, that every person who shall be guilty of such offence, shall, on conviction before one justice, upon view, or by the oath of one witness, forfeit not exceeding 5*l.* nor less than 10*s.*; and in default of payment, shall be committed to the house of correction, to be whipped and kept to

* As the object of this prosecution is not the punishment of the defendant, but the repair of the bridge, it is not indispensably requisite that he should be in personal attendance at the time judgment is pronounced upon him; and where a district or county is indicted, this of course is impossible; see 1 Salk. 55; Hawk. P. C. b. 2. c. 48. s. 17. The judgment usually is, that the parties shall pay a fine and repair; and, by the 1 Anne. c. 18. the fine set on the parties convicted is not to be returned into the Exchequer, but it is to be applied to the repair of the bridge.

† Westminster bridge, and others of great magnitude and expence, are protected by particular statutes; 2 East. P. C. 1081

hard labour; not exceeding one callendar month, nor less than seven days, unless the same be sooner paid; see Geo. 4. c. 126; s. 121.

The 1 Geo. 4. c. 16. after reciting, that whereas by an act passed in the 9th year of the reign of king Geo. entitled "An Act for building a bridge across the River Thames, from the New Palace Yard, in the city of Westminster, to the opposite shore in the county of Surry," it is in other things enacted, that "if any person or persons shall wilfully and maliciously blow up, pull down, or destroy the said bridge, or any part thereof, or attempt so to do, or unlawfully, and without authority from the said commissioners, or their successors, remove or take away any works thereto belonging, or in any wise direct or procure the same to be done; whereby the said bridge, or the works thereof may be damaged, or the lives of the passengers endangered, such offender or offenders being lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, without benefit of clergy." And whereas several other acts for building bridges have heretofore from time to time passed, and have contained enactments to the like purport and effect as the enactments in the last mentioned act above recited; and whereas it is expedient that so much of the above mentioned acts as hereinbefore recited should be repealed, enacts, that "such parts of all former acts, relating to bridges, as enacts, that if any person or persons shall wilfully and maliciously blow up, pull down, or destroy any bridge, or any part thereof, or attempt so to do, or unlawfully, and without authority, remove or take any works thereto belonging, or in anywise direct or procure the same to be done, such offender or offenders being thereof lawfully convicted, shall be adjudged guilty of felony. and shall suffer death as a felon, without benefit of clergy, shall, from and after the passing of this act, be, and the same are, hereby repealed."

Briefs.*

FORD'S CASE. H. T. 1740. K. B. 7 Mod. Rep. 922; S. C. 2 Stra. 1130.

On motion for an information against a churchwarden for refusing to collect money on a brief for fire, according to the 4th Anne c. 14. the Court refused

An information will not lie a

* These are licenses to make collections for repairing churches, restoring losses by fire, &c. The stat. 4 Anne, c. 14. enacts, when letters patent, commonly called briefs, shall be issued out of Chancery, copies thereof, to the number required by the petitioners, and no more, shall be printed by the printer of the queen, her heirs or successors at the usual rate for printing.

gainst a churchwarden for not collecting brief money.

The printer shall deliver the same, to such persons only, as shall by the consent of a majority of the petitioners, undertake the delivering or disposing of them.

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The undertaker shall give to the printer, a receipt for the same, expressing therein the number of copies; which printer shall forthwith deliver the receipt, or an attested copy thereof, to the registrar of the Court of Chancery, to be filed there.

The undertaker shall next cause all the printed copies to be indorsed, or marked, in some convenient part, with the name of one trustee or more, written with his own hand, and the time of signing.

And he shall also cause them to be stamped with a proper stamp, to be made for that purpose, and kept by the registrar of the Court of Chancery. And if any person shall counterfeit the same, he shall be set in the pillory for an hour.

This done, he shall, with all convenient speed send or deliver them to the Church wardens, or Chapel wardens, and to the teachers and preachers of every separate congregation, and to any person who hath taught or preached among Quakers. Which persons immediately after receipt, shall indorse the time of receiving, and set their names.

Then the Church wardens, or Chapel wardens, shall forthwith deliver them to the minister.

And the ministers, on receipt, shall indorse the time and set their names.

Then the ministers (and teachers respectively,) in two months after receipt, shall, on some Sunday, immediately before sermon, openly read, or cause them to be read to the congregation.

Then the Church wardens and Chapel wardens (and teachers and others to whom they were delivered,) shall collect the money that shall be freely given, either in the assembly, or by going from house to house, as the briefs require.

The sum collected, the place where, and time when, shall be indorsed, fairly written in words in length, according to the form to be printed on the back of each brief, and signed

[729] the rule, saying, that as a penalty was given to secure the churchwarden's performance of his duty, they could not interfere.

Bristol Dock Act.

1. **REX V. THE DIRECTORS OF THE BRISTOL DOCK COMPANY. T. T. 1810.**
K. B. 12 East. 428.

A motion was in this case made, for a *mandamus* to the defendants to issue their precept to the sheriffs of Bristol, for summoning a jury to assess a compensation for an injury sustained by the applicants, who were the owners of a brewery, for a loss arising to them in their business, from the deterioration of the water of the public river Avon, from which the brewery had been before by the minister and Church wardens, or by the teacher and two elders, or two other substantial persons, of such separate congregation.

Afterwards on the request of the undertaker, (or other person by him lawfully authorised,) which he is required to make within six months after the briefs were first delivered into the respective parishes, on pain of 20*l.* to be recovered by action at law, the Churchwardens and teachers shall deliver to him the briefs so indorsed, and the money thereon collected, taking his receipt for the same in some book to be kept for that purpose.

Every minister, curate, teacher, preacher, churchwarden, chapelwarden and quaker, refusing or neglecting to do any thing above required, shall forfeit 20*l.* to be recovered by action of debt, bill, plaint or information.

And in every parish or chapelry, and separate congregation, a registry shall be kept by the minister or teacher, of all monies collected by virtue of such briefs, therein also inserting the occasion of the brief, and the time when collected, to which all persons, at all times may resort without fee.

And the undertaker shall enter in a book the number of briefs, when signed and sent, and whither and when received back.

And the briefs so received back shall be deposited by him with the registrar of the Court of Chancery. And if the whole number shall not be returned, the undertaker, for every one not returned (through the default of him or his agents), shall forfeit 50*l.* unless he shall prove that it was lost or destroyed in inevitable accident, and shall pay the money collected thereon.

And the undertaker in two months after he has received the money, and after notice thereof to the sufferers, shall account before a master in Chancery, and shall be allowed all just charges.

And if any shall purchase or farm charity money on briefs, such contract shall be void, and the purchaser shall forfeit 500*l.* to be recovered by action at law; the same to be applied (as also the other penalties) to the use of the sufferers,

The usual charges of suing out a brief, with the collections thereupon, will be better understood by the following example:—

For the parish church of Ravenstondale, in the county of Westmoreland.

Lodging the certificates	£ 0 7 6
Fiat and singing	19 4 2
Letters patent	21 18 2
Printing and paper	16 0 0
Teller and Porter	0 5 0
Stamping	13 12 6
Copy of the brief	0 5 0
Postage to and from the stampers	0 5 0
Mats &c. for packing	0 4 0
Postage to the waggon	0 4 0
Carriage to the undertaker at Stafford	1 11 6
Postage of Letters and certificate	0 4 8
Clerks fees	2 2 0
<hr/>	
Total of the patent charges	£76 3 6
Salary for 9,986 briefs at 6 <i>d.</i> each	249 12 0
Additional salary for London	5 0 0

		The whole charges	£330 16 6
Collected on 9,986 briefs		£614 12 9	
Charges		830 16 6	
		<hr/>	
Clear collection		£283 16 3	
Collections	£9,986		
Blanks	503		
<hr/>			
Total number of briefs	10,489		

supplied by means of pipes laid under low-water mark, in conformity with the acts of the 43 Geo. 3. c. 140. and 48 Geo. 3. c. 11. made for completing and improving the harbour of Bristol. which gives compensation where, by means of the dock-works, or in the progress or execution thereof, damage may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby. The only doubt with the Court was, whether the claimants could establish such an interest or easement annexed to their premises in the water of the river Avon, which was a public river, common alike to all the king's subjects, as would entitle them to compensation under the general words of the clause; and it not being afterwards established that the owners of such property had, by long enjoyment, acquired special rights to the use of the water in its natural state, as it was accustomed to flow, the Court said. These persons have no more claim to compensation under the act than every inhabitant of Bristol would have who had been used to dip a pail into the river for water for the use of his house. The injury, if any, is to all the king's subjects, and that is the subject matter of indictment, not of action, and that remedy is taken away by the act.—Rule refused.

2. **HILHOUSE v. DAVIS.** H. T. 1813. K. B. 1 M. & S. 169.

This was an action of debt, to recover a sum awarded to the plaintiff by a jury, sworn and impanelled according to the 43 Geo. 3. c. 140. and 48 Geo. 3. c. 11. passed for improving the port of Bristol, to assess and award the compensation to be made by the said company to the plaintiff, for an injury sustained by him, with reference to property of his which had been materially deteriorated in value by means of the works and improvements authorized by the said acts, and which, it appeared, the judge before whom the jury was impanelled, had given judgment for. The declaration averred a demand and non-payment of such sum, to the plaintiff's damage, of 500*l*. Plea, general issue. At the trial, the record containing the jury's assessment, and the judgment thereon, was produced, and the learned judge's signature thereto was proved, and the necessary evidence to support the case was established. The jury were directed to give damages for the detention of the debt, and that the natural criterion of those damages was the interest of the sum awarded by the jury; whereupon they found a verdict for the debt and damages, which included interest on the sum awarded. A rule *nisi* was now obtained to reduce the verdict to a sum exclusive of interest; but the Court said; The jury have given interest, we cannot set their verdict aside without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving interest on a sum ascertained. The rule of law is affirmative that where a sum is ascertained, and judgment afterwards pronounced thereon in a court of record, if an action of debt be brought on that judgment, the jury may give interest, by way of damages, for the detention of the debt. The only question is, whether this may be assimilated to the case of an action on a judgment, and we think it fairly may. It is an assessment of damages before a judge of assize, who afterwards gives judgment upon it; and that comes as near to what is properly a judgment as possible.

Bristol and Taunton Navigation.

THE BRISTOL AND TAUNTON CANAL NAVIGATION COMPANY v. AMOS. T. T.
1813. K. B. 1 M. & S. 570.

This was an action against one of the proprietors of the Bristol and Taunton Navigation, to recover the amount of certain calls which had been made on the shareholders. The defendant's name appeared, in the act of the 51 Geo. 3. c. 60. which incorporated the company, amongst the list of original proprietors. His name also appeared upon the register book of the company as proprietor of 27 shares, which book was made up by the treasurer, and the corporation seal was affixed to it, as required by the act, and was now offered in evidence. The book, when produced, appeared to contain nothing more than the names of the proprietors, and the number of shares belonging to each affixed to each name. It being doubted, at the trial, whether such book could

The register book of the Bristol Canal Company is evidence in an action brought by them for calls, that the defendant is proprietor of

the shares
annexed to
his name.

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be read in evidence, the point was reserved. It was now urged, that it was admissible, as proving that the action was maintainable, as the 76th section of the above statute directs a ticket, sealed with the corporation seal, to be delivered to each of the subscribers, and that such ticket shall be evidence of his title; and the 100th section, after certain provisions, declares, that on the trial of any such action as the present, it shall only be necessary for the plaintiff to prove that the defendant, at the time of making a call, was a proprietor of such share in the said canal, in respect of which he is alleged to be responsible, and that such call was in fact made, and that such notice thereof was given as thereinbefore directed; and the production by the principal clerk, or other officer of the said company, of the said register book, and of the minutes of the proceedings of the committee of management, and of the newspapers in which notice of the said calls shall be advertised, shall be sufficient evidence in support of such action, without proving the appointment of the committee who made such call, or any other matter whatsoever; and the said company shall be thereupon entitled to recover, unless it shall appear that such call was made contrary to the directions and restrictions, in point of time or amount, contained in the act. And, although it was contended, that if the production of such book was to be considered conclusive evidence, the defendant being proprietor of the 27 shares, it would be definitely charging one party with an act done, without his assent, by another party; for the book is made up by the committee in the absence of the person to be charged; and if it be evidence at all, it is conclusive evidence, inasmuch as the act goes on to provide, that the company shall be thereupon entitled to recover, unless it appears that the call was made contrary to the act. The Court said; As the register book contains only the entries of the names of the subscribers, and the different shares annexed to each, and not any of the proceedings of the committee, it could only be with one object that the legislature directed it to be produced; namely, for that of proving the names and the number of shares. And, notwithstanding it was insisted, that there was this peculiar objection to the admissibility of such evidence, (which appeared to be the fact), viz. that the book purported to have been made up nearly five months after the call, and therefore could not be deemed evidence of the defendant's being a proprietor at the time when the call was made, unless it could be shown to have a retrospective operation. The Court adhered to the same opinion.

British Ale Company. See tit. *Parties to Actions.*

Brixton. See tit. *Requests, Court of.*

Broker.

See tits. Attorney,
Bailment,
Bankrupt,
Insurance.

Principal and Agent,
Set-off.
Stock Broker,
Vendor and Purchaser.

Brokerage. See tit. *Annuity; Usury.*

[732] **Brothel.** See tit. *Bawdy House.*

Bubbles. See tits. *Conspiracy; Joint Stock Company.*

If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received against another of them for the money so raised; *M'Gregor v. Lowe*, 1 Carr. 200; see post, tit. *Money had and received.*

Buggery. See tit. *Sodomy.*

Builder.

1. *PEPPER v. Burland*. M. T. 1792. K. B. N. P. Peake. 103.

In an action by the plaintiff, a builder, it appeared that he had agreed with

* A count in a declaration, stating that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day: that the defendant accepted the retainer, but did not perform the work within the time, per *quoad* the walls of the plaintiff's house were damaged, cannot be supported; but a count, stating that the plaintiff being possessed of some old materials, retained the defendant to perform the carpenters work in certain buildings of the plaintiff, and to use these old materials; but that the defendant, instead of using those, made use of new ones, thereby increasing the expence, may; *Else v. Gattward*, 5 T. R. 148.

Where a
builder's
contracts
to do cer-
tain work
for a parti-
cular sum,
and addi-
tions are
made to the

the defendant to do certain work of the dimensions of a house stated to be 15 original feet, for a specified sum; but the house in which the work was done afterwards appeared to be 17 feet; the defendant relied on the contract, and paid into court sufficient to cover the excess. And per Lord Kenyon, C. J. The plaintiff having failed in showing the plan by which he contracted to work to be the same as that produced, he cannot recover. The general rule, however, is, that where additions are made to a building, which the workman contracts to finish for a certain sum of money, the contract shall exist as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging.

plan, the contract remains binding, as far as it can be traced, and the excess is only recoverable under a *quantum meruit*.

2. FARNSWORTH V. GARRARD. M. T. 1807. K. B. N. P.

On *non assumpsit* pleaded to an action for work and labour, the defence was, that the plaintiff had so improperly built the front of the defendant's house, that it was in a great danger of tumbling down. The plaintiff urged that at any rate he was entitled to a verdict for the amount of the bricks.

Sed per Lord Ellenborough, C. J. Service is the gist of the action. And the rule by which it is governed is clear, that the plaintiff shall have what he deserves; the questions therefore, are, how much does he deserve? or whether he deserves any thing? If no benefit accrued to the defendant from his services, he is not entitled to any compensation for his work and labour, for his claim must be co-extensive with the benefit. What is the fact? It appears that the wall will not stand; the defendant consequently has derived no benefit from the plaintiff's labour; but has in fact sustained a damage.—Verdict for defendant. See 2 Campb. 63; 1 Campb. 377; 10 East. 555; 12 id. 381; 3 Campb. 451.

Building Act. See also tit. *Party Walls*; and 14. Geo. 3. c. 78.

REX V. THE JUSTICES OF MIDDLESEX. M. T. 1812. K. B. 16 East. 310.

A rule *nisi* was applied for by A. B. for a *mandamus* to the justices of M. commanding them to hear an appeal at their next general quarter sessions, against an order of two justices under the building act of 14 Geo. 3 c. 78. dismissing a complaint made by him, as the district surveyor appointed under that act, which had been made against a party on account of a projection made by him beyond the line of the front of his house in Lincoln's Inn Fields. It appeared that the justices had refused to entertain the surveyor's appeal, as he was not authorised to make one by the 96th section of the statute, which enacts, "that if any persons think themselves aggrieved by any conviction, commitment, distress, order, or judgment of any justice or justices of the peace, made out of sessions by virtue of this act, such person may appeal to the justices at their general quarter sessions," &c. to bring an appeal, the words used seeming to point out the party affected by such conviction, as the person to whom the appeal was meant to be limited: and although it was urged that the word judgment was large enough to give the right of appeal to the district surveyor, the Court refused the rule, and said, The appeal is given to the party aggrieved, therefore must that apply to affirmative orders. Order or judgment mean when something is ordered to be done, not a mere dismissal of a complaint. The statute imports some act to be done under an order of justices, which may be a grievance to the party.

And in such actions, evidence of the badness of the workman's ship is admissible to defeat or diminish the plaintiff's demand.

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A surveyor cannot appeal to the sessions under the 96th sect. of the Building Act, 14 G. 3. c. 78. on a mere dismissal of his complaint by two magistrates.

Bullion.

The exportation of *gold or silver*, whether in money, bullion, plate, or vessels,* except foreign coin or bullion of gold or silver exported out of any port of England in which there is a customer or collector, and duly entered at the

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* 5 Rich. 2 stat. 1 c. 2 s. 1. (and see before this act, 9 Edw. 3 stat. 2 c. 1; 17 Edw. 3. cited 3 Inst. 92-4; where it is said to have been the old law, before the Conquest, that no silver should be carried out of the realm; Mirror, c. 1 s. 3. and the regulations of 27 Edw. 3 stat. 2 c. 14 s. 2.) afterwards 2 Hen. 4 c. 5. altered by 4 Hen. 4 c. 15; 2 Inst. 741-2; 2 Hen. 6 c. 6.; 17 Edw. 4 c. 1; 3 Hen. 7. c. 8. s. 2. See Parkers Reports. 59. 64-5-6. where the information was founded on 5 Rich. 2 stat. 1. c. 2; 2 Hen. c. 45; and it was holden, that on an information of seizure, of British and foreign coins, there is no occasion for a writ of appraisement, or a second proclamation, and judgment may be for the coins themselves.

custom house; 15 Car. 2 c. 7. s. 12. see Park. Rep. 57; and except gold and silver coin exported out of this kingdom into Ireland; 20 Geo. 3. c. 18. s. 1; and except molten silver or bullion protected by a treasury license; 43 Geo. 3. c. 49: or by certificate, the principal object of which is, to establish that it is foreign bullion, and that no part of it was before it was molten the coin of the realm, or clipping thereof, or plate wrought within Great Britain,* and except watches, sword hilts, wrought plate, and other silver manufactures, made according to the rules prescribed by act of parliament, and yearly allowed by the commissioners of customs; 9 & 10 W. 3. c. 28. s. 1; is also prohibited under the penalty of the forfeiture of such gold and silver, and in some instances additional pecuniary penalties.†

Buoy. See tit. *Barge*.

Burgage Tenure.

Tenure in burgage is thus described by Littleton, s. 162. where an ancient borough is, of which the king is lord, and they that have tenements within the borough hold of the king their tenements; and every tenant tenement ought to pay the king a certain rent by the year, &c. And such tenure is but tenure in socage. It is the same where any subject is lord of such borough, and the tenants hold of him to pay each of them an annual rent; Lit. s. 163. The qualities of this tenure vary according to the particular customs of every borough, without prejudice to the feudal nature of it, and in conformity to the maxim, *consuetudo loci est observanda*; Lit. sect. 165. 6. 7. See 2 Bl. Com. 82. 83; Glanv. lib. 7. 3.

Burgage Tenement. See tit. *Quo Warranto*.

Burgess. See tit. *Corporation*.

Burglary †

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* W. 3. c. 17. ss. 5. 6. and modified by 43 Geo. 3. c. 49.

† See as to molten silver, 7 & 8 W. 3. c. 19. s. 7; and Pope, tit. 201; and as to the requisite fineness, and the marking necessary for gold and silver wares, 12 Geo. 2. c. 26. ss. 1. 5. & 6; 24 Geo. 3. sess. 2. c. 53. s. 8; 30 Geo. 3. c. 31. ss. 1 to 5; 28 Geo. 3. c. 7. s. 1; 38 Geo. 3. c. 6; Pope. tit. 213.

‡ The term *burglary* is a compound of the Saxon words *burgh*, a house, and *laron*, theft, and originally signified no more than the robbery of a dwelling-house; but now it is defined to be a *breaking and entering the mansion-house of another in the night-time, with intent to execute some felony, whether such felonious intention be executed or not.*

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I. RELATIVE TO THE ACTS WHICH CONSTITUTE THE OFFENCE.

(A) OF THE BREAKING.*

(a) *What shall be deemed such.*

1. *General rule.*

1. *REX v. HUGES AND OTHERS.* Dec. Ses. 1785. Old Bailey. 1 Leach, C. L. 406; S. C. 2 East. P. C. 491.

On an indictment for burglary it appeared that the prisoners had bored a hole with an instrument, called a *centre bit*, through the pannel of a house door, near to one of the bolts by which it was fastened; and that some pieces of the broken pannel were found within the threshold of the door; but it not

*It is a question for the jury, whether the prisoner has been guilty of any act of breaking; but whether that act amounts to a burglarious breaking, is an unmixed question of law; see Fort. 107; 1 And. 114; Saville, 59; 1 Hale. P. C. 551; 8 Inst. 64. It is not every

To constitute burglary, there must be both a *breaking* and *entering*, and the *breaking* must be such as will afford the burglar an opportu-

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nity of en-
tering, so
as to com-
mit the
felony.

appearing that any part of the bodies of the prisoners had been within the house, or that the aperture was sufficiently large to admit a man's hand; the Court held this not to be a sufficient entry, for the entry must be for the purpose of committing a felony; and the breaking must be such as will afford the burglar an opportunity of entering so as to commit the intended felony.

2. ANON 2. East. P. C. 487.

Therefore,
whether o-
pening a
window
without
breaking
the shutter
is burglary,
seems
questiona-
ble.

A glass window was broken, and the window opened with the hand, but the shutters in the inside were broken. On the question, whether this amounted to burglary, Ward, C. B., Powis and Tracey, Justices, and the recorder, thought this the extremity of the law; and on a subsequent conference, Holt, C. J., and Powel, J. entertaining considerable doubt, no judgment was given.

2. *Of the breaking on the outside.*

Where a house is encompassed by a wall, it as been thought, that "If a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary, though *aliter* if he should merely get over the wall;" 1 Hale. P. C. 559. But it would appear, that the preceeding rule only applies to the walls or gates of a city, and does not extend to a private dwelling; 1 Hale. P. C. 559. edit. 1800; but see 2 East. P. C. 448; and, therefore in two recent cases it has been holden, that breaking open an external gate not leading to any building; *Rex v. BENNET*, 1 R. & R. C. C. 289. abridged *post*, 755. or opening an area gate with a skeleton key, and thereby gaining entrance into the house; are not burglarious breakings; *REX v. DAVIS*, 1 R. & R. C. C. 312. abridged *post*.

3. *Of the breaking in the inside.*

1. *REX v. GRAY*. M. T. 1734. K. B. 1 Stra. 481.

The break-
ing may be
committed
by opening
an inner
door.*

One of the prosecutrix's servants in the house opened his lady's chamber door, which was fastened by a brass bolt, with design to commit a rape; and King, C. J. ruled it to be burglary; and the defendant was convicted.

DENTEN'S CASE. 1690. Cited *Fost*. 108.

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But it seems
that break-
ing open a
cupboard
affixed to
the free

At a meeting of the judges, upon a special verdict, they were divided upon the question. whether breaking open the door of a cupboard, let into the wall of a house, was a burglarious breaking. Mr. J. Foster has said, that with regard to cupboards, presses, lockers, and other fixtures of the like kind, in favour of life, a distinction ought to be made between cases relating to mere property, and such as affect the law respecting capital crimes. In questions between the heir or devisee, and the executor, those fixtures may with propriety enough, be considered as annexed to, and parts of the freehold; for the law will presume, that it was the intention of the owner, under whose bounty the executor claims that they should be so considered, to the end that the

entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of the indictment, *felonice et burglariter fregit*; 3 Inst. 64; 1 Hawk. P. C. c. 38. s. 4; 1 Hale. P. C. 551-2. As if a man enter into a house by a door, or window, which he finds open, or through a hole which was made there before, and steal goods, or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary; for if a man leaves his doors or windows open, it is his own folly and negligence; 4 Blac. Com. 226; 1 Hale. 551; 3 Inst. 64. But a sufficient breaking is effected by making a hole in the wall; by forcing open the door; by pulling back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window (1 Carr. 300); by drawing or bending the nails or other fastening, or by pulling back the leaf of a window with an instrument. And even the drawing or *lifting up the latch*, where the door is *not otherwise fastened*; the turning the key where the door is locked on the inside; or the unloosing any other fastening which the owner has provided, will amount to a breaking; 1 Hale. P. C. 552; 3 Inst. 64; 1 Hawk. P. C. c. 38. s. 6; 2 East. P. C. 487. So if a thief enter by the chimney, it is a breaking, for that it is as much closed as the nature of things will permit; 1 Hawk. P. C. c. 38. s. 4; 4 Blac. Com. 226.

*As where a servant lay in one part of the house and his master in another, between them was a door at the foot of the stairs, which was latched, the servant in the night-time drew the latch, and entered his master's chamber in order to murder him; this was holden to be burglary; 2 East. P. C. 588. So where a thief enters a dwelling-house in the night-time, through the out-door being left open, or by an open window, yet if, when within the house, he turn a key, or unlatch a chamber door, with intent to commit felony, this is

house might remain to those who, by operation of law or by bequest, should hold is not become entitled to it, in the same condition he put it, or should leave it entire, and undefaced. But in capital cases I am of opinion, that such fixtures which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use.†

4. *Of the breaking, in order to get out of the house, &c.*

By 12 Anne. c. 7. s. 3. it is enacted, "that if any person shall enter into the mansion or dwelling-house of another, by day or night, without breaking the same, with an intent to commit felony, or, being in such house, shall commit any felony, and shall in the night-time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night-time to commit felony."

Breaking the house of another to effect an escape, having entered without breaking, is burglary.† [740]

5. *Of breaking, by construction of law.*

HAWKINS'S CASE. Old Bailey. 1704. Cited 1 East. 485.

A. was indicted for burglary. Upon the evidence it appeared that she was acquainted with the house, and knew that the family were in the country; and meeting with the boy who kept the key, she prevailed upon him to go with her to the house, under the promise of a pot of ale; the boy accordingly accompanied her, opened the door, and let her in, whereupon she sent the boy for the pot of ale, robbed the house, and went off. This was adjudged to be clearly felony in the woman, it being in the night-time.

An admission gained by fraud will constitute a burglarious breaking.

2. CORNWALL'S CASE. M. T. 1730. K. B. 2 Stra. 881.

The defendant was indicted with another person for burglary. It appeared that he was a servant in the house where the robbery was committed, and in the night time opened the street door, and let in the other prisoner, and showed him the sideboard, from whence the other prisoner took the plate; then the prisoner opened the door and let him out, but did not go out with him, but went to bed. On the trial before Raymond, C. J. Denton, J. and Comyns, B., it was doubted whether this was burglary in the servant, he not going out with the other; and it being laid down in H. P. C. 81; Dalt. 317; that it was not burglary in the servant, the judges ordered it to be found specially. And afterwards, at a meeting of all the judges at Serjeant's Inn, they were of opinion

Or where a servant conspired with others, and opened the door for a felonious purpose.‡

burglary; *ibid.* But it would seem, that if a lodger in an inn should in the night-time open his own chamber door, steal goods, and go away, the offence would not be burglary, on account of his having a special property and interest in his chamber, and the opening of his own door being, therefore, no breaking of the innkeeper's house; 1 Hale. P. C. 554. Though if another person open such lodger's door burglariously, the act of breaking is complete, and the apartment must be described as in the mansion of the innkeeper; 2 East. P. C. 488.

*Or the breaking open a chest or box by a thief, who has entered by means of an open door, or window, is not a breaking so as to make it burglary, it being an injury to no part of the house; 1 Hale. P. C. 523-4. 555; 1 East. P. C. 488.

†Lord Hale, C. J. seems to have entertained the same opinion; 1 Hale. P. C. 555; 2 East. P. C. 489.

‡Though formerly a different rule obtained; 2 East. P. C. 490; Dalt. J. 253.

§Or where thieves raised a hue and cry, and brought the constable, to whom the occupier of the house opened the door, and when they came in they bound the constable and robbed the owner, it was holden burglary; 1 East. P. C. 485; 1 Hawk. P. C. c. 38. s. 5; 3 Inst. 64. So if admission be gained under pretence of business; 1 Hawk. P. C. c. 38. s. 8; or of taking lodgings; Keb. 63; or if one get possession of a dwelling-house by false affidavits, without any colour of title, and then rife the house, such entrance being gained by fraud, it will be burglarious; Keb. 43. So if a man go to a house under the pretence of having a search warrant, or of being authorized to make a distress, and by these means obtain admission, it is sufficient to constitute the offence; 1 Leach. C. L. 284. So if by threats of violence the owner opens the door of his house, it is a sufficient breaking and entering; 1 East. P. C. 486; 1 Hale. P. C. 553; 1 Hawk. P. C. c. 38. s. 4. But a bare assault upon a house is insufficient; for where under such circumstances the owner threw his money out to the thieves, it was holden no burglary; 1 Hawk. P. C. c. 38. s. 3. And even where the assault was so violent as to break a hole in the house, yet there being no entry, but only a carrying away of the money, coercively distributed, it was holden no burglary; 1 Hale P. C. 555.

that it was burglary in both, and not to be distinguished from the case that had been often ruled and allowed in the same page in Hale, that if one watches at the street end, while the others go in, it is burglary in all.

[741]

6. *Of the breaking where there is no interior fastening.*

1. BROWN'S CASE. Spring Assizes. 1799. 2 East. P. C. 487; S. C. Cited 1 R. & R. 157. n.

Abreaking has been holden sufficient, though there was no interior fastening to the doors which were opened.

On an indictment for burglary in the dwelling-house of G. Aldrich, it appeared that the place where the prisoner entered was a mill under the same roof, and within the same cartilage as the dwelling house. Through this mill was an open entrance or gateway capable of admitting wagons, and intended for the purpose of loading them the more easily with flour, through a large aperture or hatch over the gateway, communicating with the floor above. This aperture was closed by its own weight, but without any interior fastening; so that those without under the gateway should push them open at their pleasure by a moderate exertion of strength, in this manner the prisoner entered the mill in the night, with the evident intention to steal the flour. Fuller, J. held this to be a sufficient breaking to constitute the offence, and the prisoner was accordingly convicted.

2. CALLAN'S CASE. Old Bailey. 1809. Cited 1 Burn. Just. 396; S. C. 1 R. & R. C. C. 157.

But this doctrine seems questionable; for where there were interior fastenings to the place broken open, which were not in use at the time the door was opened, it was holden that the opening did not amount to the offence.

On an indictment for stealing three bottles of wine in the dwelling-house of the prosecutor, and afterwards burglariously breaking out of the house; the wine was stolen from a bin in the cellar belonging to the dwelling-house of the presecutor, who kept the Cock public house in Tottenham Court, and had been removed by the prisoner from thence to the street. The flap had bolts belonging to it, by which it might be bolted within; but whether it was so bolted on the night of the burglary the prosecutor could not say, but he was sure the flap was down. It did not appear whether the prisoner had entered by the flap of the cellar or not, as a door which communicated with the cellar in another direction, and which the prosecutor had left locked, was broken open. The probability therefore, was, that the prisoner had entered that way; but if he had entered by raising up the flap it would (unless prevented) have closed after him by its own weight, and in order to get out, after it had so closed, it would have required the degree of force necessary to lift up such a flap to be applied to it. The flap was a large one, being made to cover the opening of a cellar, through which the liquors consumed in the public-house were usually let down into the cellar. The prisoner when first discovered had his head and shoulders out of the flap of the cellar, and, upon being seized, made a spring, got out, and ran away; he was immediately pursued, caught, and brought back, and the flap through which he had got was then fallen down and closed. Upon this evidence it was doubted whether there was a sufficient breaking to constitute the crime of burglary; and the prisoner having been convicted, the question was saved for the opinion of the twelve judges, who, it is understood, entertained great doubts upon the question, and were equally divided in opinion. The prisoner was ultimately discharged out of custody.

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3. HALL'S CASE. Lent Assizes. 1818. Cited 1 Burn. J. 396; S. C. 1 R. & R. C. C. 355.

Though in a subsequent case it has been decided, that opening a window, by pushing on ly without breaking, was a burglary.

Hall was convicted in York Lent Assizes, 1818, of Burglary; it appeared that the prisoner entered the prosecutor's house by lifting up a large iron grating which was placed over the cellar (for the admission of light only,) and opening a window in a passage leading from that cellar; the cellar opened into a passage which led into the house, and the window was within the walls of the house, the cellar was beyond the walls. The grating weighed eight stone, and was usually fastened by a large iron chain, but it was not so fastened at the time the prisoner entered. The window opened upon hinges, and was fastened by two nails which acted as wedges, but those nails would open by push-

* So pulling down the sash of a window is a breaking though it has no fastening, and is only kept in its place by the pulley weight; and it is equally a breaking, although there is an outer shutter which is not put to; *Rex v. Haines*, 1 R. & R. C. C. 451.

ing. It was objected by the prisoner's counsel that the lifting up the grate was no breaking, because it was kept down by its own weight only; and that the forcing open the window was no breaking, because it was done by pushing only. Mr. J. Bayley thought that the window was a breaking, but reserved both points for the consideration of the judges, who held the conviction right, and the prisoner received sentence of death, but was afterwards reprieved, and transported for fourteen years.

(B) OF THE ENTRY.

(a) What shall be deemed an entry.

1. *General rule.* See ante. 731. Breaking in general.

2. *Of an entry by making an aperture, introduction of an instrument, or prisoner's person.*

GIBBON'S CASE. JUNE Assizes. 1752. Old Bailey. 2 East. P. C. 490; S. C. Post. C. L. 107.

This was an indictment against Gibbons for burglary in the dwelling-house of John Allen. It appeared that the prisoner in the night-time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole; took out watches and other things which hung within his reach; but no entry was proved otherwise than by putting his hand through the hole. And the judges held that to be burglary. To constitute burglary, an entry, with any part of the body as a hand, is sufficient.* [743]

3. *Of an entry by breaking a window.*

REX v. BAILEY. Jan. Assizes. 1818. Old Bailey. 1 Burn. Just. 398; S. C. 1 R. & R. C. C. 341.

William Bailey and Robert Spencer were tried at the Old Bailey, January sessions, 1818, before Park, J. for burglariously breaking and entering the dwelling-house of Zachariah Boote, Esq. with intent to steal. The case was very clearly and satisfactorily proved, and the jury found the prisoners guilty; but a doubt arose whether the following facts were sufficient to establish such an entering as is requisite to constitute the crime of burglary, there being no question as to the breaking or intent to steal. The window of the kitchen was proved to be fastened in the following manner. The sash was drawn down, closed, and fastened at the point of division by a latch in the inside. The inside shutters were closed, and fastened by a bar. The pane in the upper part of the window was broken in order to put in a hand to remove the latch; then the lower sash was thrown up to enable the prisoners to introduce a centre bit to cut a hole in the shutters; and while they were engaged in this last operation, and before they had completed it, they were seized. The jury expressly found that the window was latched, and that the hand of one of the prisoners, both being present, was introduced in order to remove the latch, but the shutter was never actually broken. It was submitted to the judges whether this introduction of the hand for the above purpose was such an entering as will constitute burglary, with the other necessary proof. At the Old Bailey, May sessions, 1818, Bayley, J. informed the prisoners that the judges had considered their case, and were unanimously of opinion that there had been a sufficient entry of the house to constitute the offence of burglary. The hand of one of the prisoners, it appeared, had been introduced beyond the glass window so as to reach the inward shutter, and the intervening space clearly was within the dwelling house, the conviction was right. And breaking a window and putting in a hand in order to open the shutter, which is not completed in consequence of detection, is a sufficient entry to constitute burglary.

* Or a finger; 1 R. & R. C. C. 499; or foot, or with any instrument introduced for the purpose of committing a felony; 1 Hale P. C. 555; 3 Inst. 64; 1 Hawk. P. C. c. 39. s. 11; 1 And. 115; 4 Blac. Com. 227. As if a thief breaks a window of a house in the night time, with an intent to steal, and puts in a hook; 1 Hale, P. C. 555; 3 Inst. 64; or an infant; ibid; to reach out the goods, or puts a pistol in at the window with intent to kill; this is a burglary, though the hand of the culprit be not within the window; 1 Hale P. C. 555; 3 Inst. 64. And where thieves came by night to rob a house, the owner went out and struck one of them, another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold, this was adjudged burglary; 2 East. P. C. 490. Though where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered, when the owner from fear threw out his money to him and he went on with it, it has been deemed not to amount to burglary; 1 Hale, P. C. 555;

4. *Of an entry by doing some act of violence on the outside of the house.*

Although discharging a loaded gun into a house is a sufficient entry; 1 Hawk. P. C. c. 38. s. 7; yet it has been doubted whether shooting on the outside of a house, even though the contents come in, would be deemed a sufficient entry; 1 Hale. P. C. 555; see 1 East. P. C. 490.

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5. *Of an entry by fraud and collusion.*

See *ante*. Breaking by construction of law.

II. RELATIVE TO THE TIME AT WHICH THE OFFENCE MAY BE COMMITTED.

(A) IN THE NIGHT-TIME.

The offence must be committed in the *night*. Anciently the day was considered to begin from sun rising, and to end at sun setting; but it is now generally agreed, that if there be sufficient remains of day-light to discern the features of a man's face, no breaking can be burglarious; 3 Inst. 63; 1 Hale. P. C. 550; 2 Leach. C. L. 710; though this does not extend to moon-light nights, for, as observed by Blackstone, J. 4 Com. 224. "the malignity of the offence does not so properly arise from its being done in the dark as in the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless;" 1 Hawk. P. C. c. 38. s. 2.

(B) IN THE DAY-TIME.

No burglary can be committed in the day-time; 4 Blac. Com. 224.

(C) AT TWILIGHT.

If the breaking and entering be committed during twilight, then if there be not day-light or *crepusculum* enough, begun or left, to discern a man's face withal, then it is burglary, otherwise not; 3 Inst. 63; 1 Hale. P. C. 550; 1 Hawk. P. C. c. 38. s. 2; 4 Bla. Com. 224.

(D) WHETHER THE BREAKING AND ENTRY MUST BE AT THE SAME TIME.

Both the breaking and entry must be nocturnal, but the entry need not be at the same time as the breaking; hence, if thieves break a hole in the house one night, with intent to enter on another, and to commit felony, which they execute accordingly, it is burglary; 1 Hale. P. C. 551; 4 Bla. Com. 226; 1 R. & R. C. C. 417; but it has been said, 1 Hale, P. C. 551. that if the breaking be in the day-time, and the entering in the night, or the breaking in the night, and entering in the day, it will not be burglary; though the accuracy of this doctrine has been questioned; 1 Hale. P. C. 551. edit. 1800; 2 East. P. C. 569; Crompt. 33.

III. RELATIVE TO THE PLACE IN WHICH THE OFFENCE MAY BE COMMITTED.

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(A) WHAT SHALL OR SHALL NOT BE DEEMED A MANSION-HOUSE.

(a) *In general.*1. *Of the general rule.*

Lord Coke, 3 Inst. 64. has said "every house for the dwelling and habitation of man is taken to be a mansion-house wherein burglary may be committed." The term dwelling-house comprehends all buildings within the curtilage or enclosure; see 1 Hale. P. C. 358. 559; 1 Hawk. P. C. c. 38 s. 12; East. P. C. 492.

2. *Of the residence which makes a house a dwelling or mansion-house..*

1. REX v. LYONS. Jan. Sess. 1778. Old Bailey. 1 Leach. C. L. 185; S. C. 2 East. P. C. 497. *Semle* S. P. HALLARD'S CASE. Spring Ass. 1796. Cited 1 Russel on Crimes, 922.

One S. having purchased a house, with an intention to reside in it, had placed in it some of his furniture and effects to the value of 10*l.*; the house so where thieves perforated a door with a centre bit, and part of the chips were found in the inside of the house, by which it was apparent, that the end of the centre bit had penetrated into the house, yet, as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, it was decided that this entry was not sufficient to constitute burglary; Rex v. Hughes, 2 East P. C. 491. abridged ante 787.

The house must be a place of actual residence; therefore burglary cannot be committed in a house under repair, which is not inhabited by

was put under the care of a carpenter for the purpose of being repaired, and the owner, S. had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatsoever, sleep therein. While the house was in this situation, it was broken open in the night; and upon a case reserved, the judges were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary.

2. *REX v. FULLER*. Dec. Sess. 1782. Old Bailey. 1 Leach. C. L. 186; S. C. 1 East. P. C. 498.

A house, newly built, and finished in every respect except the painting, glazing, and flooring of one garret, and a workman constantly employed by the prosecutor (the builder of the house) sleeping in it, for the purpose of protecting it, but no part of the prosecutor's domestics or family having taken possession of it, the judges, on the authority of the preceding case of *Rex v. Lyons*, held it not to be the dwelling-house of the prosecutor.

3. *REX v. HARRIS*. Oct. Sess. 1795. K. B. 2 Leach. C. L. 701; S. C. 2 East. P. C. 498.

In this case, it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there, nor any of his family; but that on the night in which it was broken, and for six nights anterior, he had procured two hair-dressers, who were not in any situation of servitude to him, to sleep there, for the purpose of taking care of his goods and merchandize, which were deposited therein; the Court were of opinion that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor.

4. *REX v. DAVIES AND ANOTHER*. June Sess. 1800. Old Bailey. 2 Leach. 876; S. C. 2 East. P. C. 499.

Upon an indictment for having stolen goods to the value of 40s. in a dwelling-house, it appeared, that one P., a brewer, had a public-house, which was shut up, and during the day uninhabited, but one of P.'s servants slept therein at night for the protection of the goods, &c. until some publican should take possession of it; it also appeared that P. had no intention of residing in the house himself, either personally or by means of any of his servants. The prisoner was convicted on the whole charge stated in the indictment; but the point being reserved, the judges were of opinion; that the conviction as to the capital part of it was wrong; that as P. never intended to inhabit the house, it could not, in the contemplation of law, be considered as his dwelling-house, and that it would have been no burglary if the house had been broken in the night.

5. *REX v. THOMPSON*, Lent Ass. 1796. 2 Leach. C. L. 771; S. C. 2 East. P. C. 498.

On an indictment for burglary, the evidence proved that the prosecutor had taken a certain house, and that he had removed a greater part of his household furniture into the same; but that neither he, nor any of his family or servants, had ever slept therein. On a case reserved, the judges were of opinion that this could not be deemed a dwelling-house, and the prisoner was acquitted.

6. *NUTBROWN'S CASE*. 1750. Old Bailey. 2 East. P. C. 496; S. C. Fost. 76.

John and Miles Nutbrown were indicted for burglary in the dwelling-house of one Mr. Fakney, at Hackney, and stealing divers goods. The prosecutor made use of it as a country-house in the summer, his chief residence being in London. About the latter end of the summer preceding the offence, he removed with his whole family to his house in the city, and brought away a considerable part of his goods; and in November, his house at Hackney was

Nor can it be committed in a newly built house, even though the builder resides there in for its protection.

And the same rule obtains [746] where the prosecutor employs not in the capacity of servants to take care of his property preparatory to his removal.* So where the owner of a house has no intention of residing therein, and merely sends a servant to sleep there to protect his goods, &c. it can not be deemed a dwelling-house. Because either the owner, or his family, or servants, must sleep therein.

Unless the absence be occasional or temporary, with an intention of the owner

* And though he has used it for his meals, and all the purposes of his business; *Rex v. Martin*, 1 R. & R. C. C. 108;

† Therefore, if A., have two dwelling houses, and, upon occasion, he, and all or of the his family, be sometimes at one and sometimes at the other, an entry into one of house to rob them in the night time, in the absence of his family, will be burglary; 1 Hale. P. C. 556. turn.

broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock and a few old bedsteads, and some lumber of very little value, leaving no bed or kitchen furniture, or any thing else for the accommodation of a family. Mr. F. being asked, whether, at the time he so unfurnished his house, he had any intention of returning to reside there, declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to leave the house, and to let it for the remainder of his term. The fact of the prisoner's guilt was sufficiently proved, and that the offence had been committed by midnight. The Court were of opinion, that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed his dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary, which they did, but found them guilty of the stealing; and they were ordered for transportation. And the distinction is this; where the owner quits the house *animo revertendi*, it may still be considered as his mansion-house, though no person be left in it; but there must be an intention of returning, otherwise it will be no burglary.

As where he is absent for a month though no person be left therein.

And it seems, that if a person die in his house, and his executors put servants in it, a burglary may be committed therein.

The owner may occupy by any person who is deemed part of his family.*

7. MURRAY AND HARRIS'S CASE. 1697. Old Bailey. 2 East. P. C. 496. John Nichol being possessed of a house in Westminster, wherein he dwelt, took a journey into Cornwall, with intent to return, and sent his wife and family out of town, and left the key with a friend to look after the house; after he had been gone for a month, no person being in the house, it was broken open in the night, and robbed of divers goods. He returned a month after with his family, and resided there. The persons who had committed the robbery were adjudged burglars.

8. JONES AND LONGMAN'S CASE. 1689. Old Bailey. Cited 2 East. P. C. 499. A died in his house. B., his executor, put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself; and upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The Court seemed to think it might, because the servants lived there.

3. Of the occupancy which amounts to an ownership.

FARRE'S CASE. Kel. 43-4.

A lady, whose house had been broken open, had for many years lived separate from her husband; and when she was about to take the house, a lease of it was prepared in her husband's name, but he refused to execute; in consequence of which she agreed with the landlord herself, and had constantly paid the rent. Upon an indictment for burglary, laying the dwelling-house in the husband, it was holden good. See *post*, 748. note.

(b) In particular.

[748] 1st. Of banking-houses. See Partnership-houses, *post*, 751. 2d. Of barns.

The fact of a servant having slept in a barn on the night on which it was broken open, and for several preceding nights, for the purpose of watching for thieves, does not make it a dwelling-house; Brown's case, 2 East. P. C. 497. *abridged infra*.

*If a general rule, observes Mr. East, 2 East. P. C. 499. 500. by which to ascertain the ownership might be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there if he inhabit either by himself, his family, or servants, the indictment must lay the offence to have been committed against his mansion; see also 2 East. P. C. 501-2; 2 And.

Where a married woman lived apart from her husband upon an income arising from property vested in trustees, for her separate use, it was decided that a house which she had hired to reside in, was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it; Rex v. French, 1 R. & R. C. C. 498. And in Rex v. Wilford, 1 R. & R. Crown Cases, 517. it was holden, that the house of a husband, in which he allowed his wife to live separate from him, might be described as the house of the husband, though the wife lived there in adultery with another man, who paid the housekeeping expences, and though the husband

3. *Of booths and tents.*

Neither booths or tents are deemed dwelling-houses; 1 Hale. P. C. 557; 1 Hawk. P. C. c. 38. s. 35; 4 Blac. Com. 226.

4. *Of buildings under the same roof as the dwelling-house.*

1. BROWN'S CASE. Sum. Ass. 1787. 2 East. P. C. 501; S. C. Cited 2 Leach. C. L. 1018.

G. Brown was indicted for burglary in the dwelling-house of Mr. Graydon, and stealing thereout oats. A second count stated it to be the dwelling-house of Mr. Prumball. Graydon, a farmer, had a dwelling-house, in which he lived, a stable, cowhouse, cottage, and barn, all in one range of buildings, and under one roof, but they were not inclosed by any wall or court-yard, nor was there any communication from one to the other within. Trumball's family resided in the cottage, by agreement with Graydon, when he went into his service; but Trumball paid no rent; only an abatement was made in his wages on account of his family residing in the cottage. Some corn having been missed out of the barn, Trumball and another person put a bed in the barn, and went and slept there; and a few nights after they had so done, the prisoner unlocked the barn door, and took away a quantity of oats. After conviction, judgment was respited, upon a doubt whether it could be considered as the dwelling-house either of Graydon or Trumball. Upon a reference, it was agreed by all the judges that the sleeping in the barn made no difference. But they hold, (Buller, J. doubting) that this was no more than a licence to Trumball and servant to lodge in the cottage, and not a letting of it to him; and that the barn, as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of Graydon; and many of the judges inclined to think, that if there had been a demise of the cottage to Trumball, the barn would still have continued part of Graydon's dwelling-house in point of law. [749]

2. REX v. EGGINGTON AND OTHERS. Lent Ass. 1801. Stafford. 2 Leach. C. L. 913; S. C. 2 East, P. C. 494. 666; S. C. 2 B. & P. 508. S. P. REX v. MITCHELL. OLD BAILEY. 1817. Cited 1 Dick. Just. 336.

The first count of an indictment for burglary in the dwelling-house, laid the dwelling-house to be in A., the second laid the dwelling-house in B., and the third laid the dwelling-house in C. It appeared in evidence, that the place broken into was a centre building, having two wings; that in such centre building an extensive business was carried on, relating to different manufactures, suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. But in Rex v. Jobling, 1 R. & R. C. C. 525. where the owner of a cottage let one of his workmen, with his family, live in the cottage free of rent and taxes, and he lived there principally, if not wholly, for his own benefit, it was holden that it might be described as the workman's dwelling-house. Though in Rex v. George Jarvis and Benjamin Walker, 1 R. & M. C. C. 7. it was decided, on an indictment for burglary, that if a servant lives in a house of his master's, at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his service. So though a servant live rent free for the purpose of his service, in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises which his master occupies, it may be described as the house of a servant, especially if the house belongs not to his master, but to some person paramount to his master, as in the case of the toll collector's house occupied by the servant of the lessee of the tolls, for the purpose of collecting the tolls; Rex v. Morris, 1 Ryan & Moody's Crown Cases, 42; but see 1 R. & R. 185.

*So a building within the same fence as the dwelling-house, and used with it as parcel of the dwelling-house, though it has no internal communication with the house, but through an open passage, is parcel of the dwelling-house; and it is equally parcel of the dwelling-house, though used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he has a partner; Rex v. Hancock, 1 R. & R. 170. So a building used with a dwelling-house, and opening into an inclosed yard belonging thereto, may be parcel of the dwelling-house, though it also opens into an adjoining street, and although it has no internal communication with the dwelling-house; Rex v. Lithgo, 1 R. & R. C. C. 357. But if a house be let to A., and a warehouse under the same roof, and with an internal communication to the house, to A. and B., the warehouse, in an indictment for burglary, cannot be described as the dwelling-house of A.; Rex v. Jenkins, 1 R. & R. C. C. 244.

ternal communication between the centre building and the wings, though the roofs of all were connected, and the entrance of all were out of the same common enclosure, held not to be a dwelling-house in which burglary could be committed.

[750] So where robbers broke into a room under the roof of the dwelling-house from which they passed under another roof in to a contiguous building, then again under the roof of the principal mansion and broke open a door there; passed through that portion of the dwelling into the passage and through it into a warehouse at the other extremity of the premises, in which was the counting-house, and stole bank-notes it was held to be burglary.

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in which one E. was concerned with A., C., and several other persons; and also relating to two other manufactories, in which E. was concerned on his own account; that in part of one of the wings was the dwelling-house of A., and in the other part of the same wing the dwelling-house of B. mentioned in the second count of the indictment, who was a workman of E., but that neither of such dwelling-houses had any internal communication with the centre building, except only in the one occupied by B. a window which looked into a passage that ran the whole length of the centre building; and that in the other wing was the dwelling-house of C., which also had no internal communication with the centre building. It also appeared, that in the front of this building there was a terrace or front yard, fenced round in different ways, and at the end of the pile of buildings by a wall, with gates for horses and carriages, and a door for foot passengers; that the prisoners entered by a door in the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle yard; from thence through a door, which had been left open, up a staircase in the centre building, where they broke open some of the rooms, having so entered the premises by the assistance of a servant of E., who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon this case being reserved for the consideration of the judges, they were all of opinion, that the prisoners were not guilty of burglary, upon the ground that the centre building being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house, and that it could not be deemed as under the same roof as the houses adjoining, though the roof of it had connexion with the roofs of the houses.

3. *REX v. WILLIS.* Old Bailey. 1817. Cited 1 Dick. Just. 326.

The prisoners were indicted at the Old Bailey, for burglariously breaking and entering the dwelling-house of Thomas Wilkinson the elder, about 12 o'clock on the night of the 18th of December, with intent to steal, and burglariously stealing therein three 10*l.* Bank of England notes, one 40*l.* ditto, and twenty 1*l.* notes, the property of the said Thomas Wilkinson the elder, Thomas Wilkinson the younger, John White, and Richard Perry; and thirty-eight 1*l.* Bank of England notes, the property of the said John Perry. Several counts in the indictment, laying the offence differently, stating the different parts of this property in the respective parties somewhat variously, and also charging one of the prisoners in a different capacity, (*viz.* as an accessory), gave occasion to much legal discussion, and to considerable discrimination of offence, as it attached to one or other of the parties implicated, during the trial; but so far as concerns our present subject of consideration, the evidence went to prove as follows: Mr. Wilkinson and partners are great upholsterers, and have extensive premises in Moorfields. The dwelling-house in which Mr. Wilkinson lives is part of the premises, and under one and the same roof with the counting-house (from which the property was stolen), the warehouse, and a lumber room. In this lumber room was a door which communicated with a passage, beyond which lay the workshop and store. The store-room is the extremity of the premises one way, and has a window looking into a yard, which yard also looked to a window at the back of a house inhabited by Harris, one of the prisoners, the front of which latter house is in Sash-court.—The different parts of Wilkinson and Co.'s premises are all contiguous; but the roof of the workshop, which is at the extremity (the counting-house being at the other extremity of the building, and no part of the dwelling-house itself,) is not under one and the same roof as the part inhabited by Wilkinson, *sen.*; and in order to go from Wilkinson's dwelling apartments to either the store-room on one side, or to the lumber-room on the other, a person must go from under the roof of Wilkinson's dwelling, under another roof, *viz.* the roof of the work-shop, whether his design be to continue in the workshop or store-room, or to return under the dwelling-house roof in order to reach the counting-house at the other extremity of the premises. The door of communica-

tion, however, between the store-room and workshop (through both which, it was in evidence, the offenders had passed), and the lumber room in Wilkinson's dwelling-house, had been locked the night previous to the robbery, and had been broken open. There was not any doubt but the robbers had come out of Harris's window into the small yard at the back of his house; had broke and entered a closed glass casement window in the store-room of Wilkinson; had proceeded into the workshop, from which they had got into his lumber-room, being part of his dwelling-house; had there broken open a door of communication between that room and a passage leading immediately to the counting-house, in which they had committed the robbery. So that in this case, as in that immediately preceding, there appears to have been "a breaking and entering a mansion-house in the night, with intent to commit a felony." But, under the direction of the Court, three of the prisoners were acquitted of the burglary, convicted of stealing only, and transported for seven years.

5. *Of buildings not under the same roof as dwelling-house.*

1. *REX v. GARLAND*. 1776. 1 Leach. C. L. 144; S. C. 2 East. P. O. 493. This special verdict stated that the prisoner broke and entered, in the nighttime, an out-house, in the possession of one G. S., and occupied by him with his dwelling-house, and separated therefrom by an open passage eight feet wide, with intent to commit a felony, and that the out-house was not connected with the dwelling-house by any fence inclosing them both; the judges were unanimously of opinion, that from the manner in which the jury had found the facts, it was impossible to consider this out-house as part of the dwelling-house, and that the jury should have found it parcel of the dwelling-house if it were so.

It is not burglary to break into an outhouse occupied with a dwelling house, but separated there from by an open passage eight feet wide, and not connected with the latter by an inclosure.*

2. *REX v. CHALKING*. Lent Ass. 1817. Cited. 1 Burn. J. 400; S. C. 1 R. & R. C. C. 334.

William Chalking and George Lewis were tried for burglary, and stealing a large quantity of cloth in the dwelling-house of John Baams. The prosecutor was a clothier, at Chippenham; his dwelling house was situate at the corner of two streets; a range of workshops adjoining the house at one end, and, standing in a line with that end of the house, faced one of the streets. The roof of the range was higher than the roof of the house. At the end of this range (and adjoining to it) was another work shop, projecting further into the street, and adjoining to that a stable and coach-house, used with the dwelling house. There was no internal communication between the work-shops and the dwelling-house; nor were they surrounded by any external fence. A court-yard and garden belonging to the dwelling-house lay behind the house, and the workshops. There were two entrances into this range of workshops; one by a door opening into the street, and another by an opposite door opening into the court-yard. The street door of this range was opened by a pick-lock key, and the goods were stolen from one of the workshops. The jury found the prisoners guilty; but a doubt arising, whether the place broken, and from which the goods were stolen, ought to be considered as parcel of the dwelling-house, the point was referred to the judges, who held the conviction right.

[752] But if there be an inclosure though the building be not under the same roof, it is burglary.

6. *Of cellars.*

If the only passage to a cellar be out in the streets, and the cellar be let separately, no burglary can be committed in it; see Gibson's case, 1 Leach. C. L. 357; 2 East. P. C. 508; abridged *ante*.

* For an out-house cannot be deemed a dwelling-house, unless it be parcel of the dwelling-house; 1 Hale. P. C. 559. So a building separated from the dwelling-house by a public road, however narrow, will not be a parcel of the dwelling house, if there be no common fence or roof to connect them, though it is held by the same tenure, and though some of the offices necessary to the dwelling adjoin it; and though there is an awning extending from it to the dwelling-house; but if it be made a sleeping place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house; *Rex v. Westwood*, 1 R. & R. C. C. 495; but an out house in the yard of a dwelling-house will be parcel of the dwelling-house, if the yard be enclosed, though the occupier has another dwelling-house opening into the yard, and he lets such dwelling with certain easements in the yard; *Rex v. Walters*, 1 Ryan and Moody's C. Ct. 13; as a bakehouse, eight or nine yards distant from the dwelling, with a pale to connect them; 1 Hale. P. C. 58; 1 Hawk. P. C. c. 88. s. 24.

7. *Of chambers* and lodgings.*

If the owner who lets out apartments to other persons does not dwell in the same house, each room occupied by an individual is deemed his mansion.†

[753] And the same rule holds, though the owner occupies some part of the house, provided he does not inhabit it.

1. *REX v. CARRELL.* Feb. Sess. 1782. Old Bailey. 1 Leach. C. L. 237; S. C. 2 East, P. C. 506; S. C. 1 Hawk. P. C. c. 38. s. 29. S. P. *REX v. TRAPSHAW.* Aug. Sess. 1766. Old Bailey. 1 Leach. C. L. 427.

A prisoner having committed a burglary in a house which belonged to one N. who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week, and an inmate named J. had two apartments in the house; namely, a sleeping-room upon one pair of stairs, and a workshop in the garret, which he rented by the week as tenant at will to N.; the workshop was broken open by the prisoner. And upon a case referred to the judges, whether the indictment had properly charged the burglary in the dwelling-house of J.; ten of the judges were of opinion that as N., the owner of the house, did not inhabit any part of it, the indictment was sustainable. See 1 R. & R. C. C. 411, 480.

2. *REX v. ROGERS.* Oct. Sess. Old Bailey. 1 Leach. C. L. 89; S. C. 2 East. P. C. 506.

The proprietor of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour, and a cellar (which ran underneath the shop and parlour, at a yearly rent; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and made an allowance to the inmate of 10s. a year, which was deducted from the rent. The entrance to the house was by a common outer door from the street. The shop and parlour were broken open; and upon an indictment for burglary, laying the offence to have been committed in the dwelling house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar, though it would have been otherwise if the owner had occupied any part of the house.

8. *Of chapels and churches.*

A burglary may be committed by breaking and entering into a church or chapel; 1 Hawk. P. C. c. 38. s. 10.

9. *Of the colleges and universities.*

Burglary may be committed in a college at the Universities.

MAYNARD'S CASE. Lent Ass. 1774. 2 East. P. C. 501.

C. M. was indicted for burglary in the mansion-house of the master, fellows, and scholars of Benet College, in Cambridge. It appeared that he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges, upon a reference to them, that it was burglary.

10. *Of corporation houses,† and houses belonging to public companies.*

Apartment in a house belonging to a public company,

[754] must be deemed the mansion of the company, and not of an occupier who merely inhabits as servant to the company.

1. *HAWKIN'S CASE.* 1704. Old Bailey. Fost. 38; S. C. 2 East. P. C. 501.

S. P. PICKET'S CASE. 1765. Old Bailey. 2 East. P. C. 501.

Hawkins was indicted for burglary in the mansion-house of S. Story; it appeared that it was the house of the African company, and that Story was only an officer of the company, having apartments and inhabiting the house. It was ruled by Holt, C. J. Trace, J. and Bury, B. that Story's apartments could not be said to be his mansion-house, he only occupying them as an officer of the company; for though the aggregate body could not be said to inhabit any where, yet they might have a mansion-house for the habitation of their servants.

* If A. have chambers in an inn of court, where he usually lodges in term time, and, in his absence in the vacation, the chambers be broken open, it will be burglary; 1 Hale. P. C. 556.

† But if the proprietor reside in the house, the property must be laid in him; Keb. 84; 4 Blac. Com. 225; though it is otherwise if he and his lodgers enter by different outer doors; see 4 Blac. Com. 225; 2 East. P. C. 503. And if the proprietor break open the apartments of his lodgers in the night, and steal their goods, the offence will not be burglary, on the ground that a man cannot commit burglary by breaking open his own house; see 2 East. P. C. 936.

‡ Where the hall belonging to a corporation is broken open, it may be described as the dwelling-house of the clerk of the company, if he resides there; 2 Leach. 931. n.

2. REX v. MARGETTS AND OTHERS. 1801. Old Bailey. 2 Leach. C. L. 930.

This was an indictment for burglary; it appeared Sylvester, the prosecutor, kept a blanket warehouse at No. 9, Goswell-street, and resided, together with his wife and children, in the house over the warehouse. The warehouse was on the ground floor, and consisted of four rooms, the second of which was the room that was broken into, and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of Mr. William Selman and others, a company of blanket manufacturers consisting of 60 or more, at Whitney, in Oxfordshire, none of whom ever slept in the house. The whole rent of both dwelling-house and warehouse was paid for by the company at Whitney, to whom Sylvester acted as servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free; and the lease of the premises was in the company. The commission of the offence was proved by very clear and satisfactory evidence. On the question whether this must be considered the dwelling-house of the company, and not the house of Sylvester, who inhabited it merely for them, the Court was clearly of opinion that it was rightly charged to be the dwelling-house of Sylvester; for although the lease of the house was held, and the whole rent reserved paid, by the company in the country; yet as they have never used it in any way as their habitation, it would be doing an equal violence to language and common sense to consider it as their dwelling-house, especially as it was evident that the only purpose in holding was to furnish a dwelling to their agent, and warehouses for the commodities therein deposited. The prisoners were found guilty.

But if an agent of the company reside there with his family for the purpose of carrying on the business, it may be laid to be the dwelling-house of the agent although the rent be paid and lease held by the company.

11. Of cow-houses.

A burglary may be committed in a cow-house, if it be parcel of the messuage; 1 Hale. P. C. 558.

12. Of dairy-houses.

Or in a dairy-house, if it be parcel of the messuage; 1 Hale. P. C. 558.

13. Of gates.

1. REX v. BENNETT. Old Bailey. 1814. Cited 1 Furn. Just. 397; S. C. 1 R. & R. C. C. 289. [755]

William Bennett and John Turnwell were convicted of burglariously breaking and entering the dwelling-house of W. A. Frampton in the night, with intent to steal his goods and chattels in the said dwelling-house. It appeared in evidence that the place broken was an external gate not opening into any building, but only into the yard, through which access might be had without interruption to the dwelling part of the prosecutor's premises. But upon reference to the judges, on case reserved, they unanimously held this not to be burglary, the place broken being the outward fence of the curtilage only.

Breaking open an external gate not opening into any building;

2. REX v. DAVIS. Old Bailey. 1817. Cited 1 Burn. Just. 397; S. C. 1 R. & R. C. C. 322.

In the case of John Davis and James Lemon, who were convicted of burglary, a question arose whether the opening an area gate by means of a skeleton key, and thereby affecting an entrance through the kitchen door, which was open, would constitute the crime of burglary. Graham, B. stated, that nine judges, assembled to consider this case, were unanimously of opinion that the area gate not being part of the dwelling-house, there was not a sufficient breaking to constitute the crime of burglary.

Or opening an area gate with a skeleton key, and thereby gaining entrance into a house is not burglary.*

14. Of government offices.
REX v. PEYTON. May Sess. 1784. Old Bailey. 1 Leach. C. L. 324; S. C. 2 East. P. C. 501. S. P. BURGESS'S CASE. Kel. 27.

A house at Chelsea, which was used as a government office, called the Invalid Office, and the rent and taxes of which were paid by government, being broken into, it was holden by the judges that the indictment was defective in laying it to be the house of a person who occupied the whole of the upper part of it.

If a burglary be committed in a government office it must be laid as the mansion house of the king

15. Of inns.

* But breaking the walled gates of a city is burglary; 1 Haw. P. C. c. 38. s. 10.

If the chamber of a guest at an inn be broken open, it must be laid in the indictment as the mansion-house of the innkeeper, and not of the guest.

Burglary may be committed in *lofts* built over coach houses, if they are converted into sleeping rooms, and there be an outer door to them.

Ownership of apartments in places occupied by servants must be deemed the mansion of the king.*

[757] If one house be divided to accommodate the families of two partners, though only the rent and taxes are paid from the partnership fund, each part will be regarded as the mansion of its inhabitant, if there be no internal communication from

PROSSER'S CASE. 1768. Sum. Ass. 2 East. P. C. 502. 3.

This indictment for burglary stated that the prosecutor came to a public-house to stay all night, and fastened the door of his bed-chamber; when the prisoner, pretending to the landlord that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment, and the prisoner accordingly stole them. Baron Adams, who tried the prisoner, doubting whether the chamber could be deemed the dwelling-house of the prosecutor, reserved the point for the opinion of the judges, who all thought that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for that particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger, and that he had no *certain and permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, and therefore the indictment was insufficient, because the burglary should have been laid in the dwelling-house of the innkeeper, and not of the guest.

16. *Of lofts and stables.*

REX v. TURNER. Feb. Sess. 1784. Old Bailey. 1 Leach. C. L. 805; S. C. 2 East. P. C. 492.

The prosecutor, who was a coachman to a private person, rented rooms over the stables at a yearly rent; but it appeared that he had never paid any rent, and that the rooms were not rated in the parish books as a dwelling-house, but as appurtenances to the stables, &c. The entrance to the stables was down a passage, out of the public mews, to a staircase which led to these rooms, and the way to which staircase was through a door which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night, and was broken open by the prisoner. On an indictment for the burglary, it was contended, on behalf of the prisoner, that these rooms, probably, were originally intended as mere hay-lofts, and could not, therefore, be deemed a dwelling, &c. But the objection was overruled; the judges being of opinion, that the circumstance of these rooms being situated over the coach-house and stables would not alter the nature of the case, and that they were, to all intents and purposes, the habitation and domicile of the prosecutor and his family.

17. *Of palaces and noblemen's houses.*

WILLIAMS'S CASE. 1 Hale. P. C. 522.

This indictment for burglary charged three persons with having broken into the lodgings of Sir H. Humgate, at Whitehall. And it was agreed, that the indictment should be for breaking the king's mansion, called Whitehall.

18. *Of partnership houses.*

1. REX v. JONES. Sept. Sess. 1790. Old Bailey. 1 Leach. C. L. 537; S. C. 2 East. P. C. 504.

The prisoner was indicted for burglary and larceny in the dwelling-house of T. S. and J. K. It appeared that these persons were in partnership, and lived next door to each other. The two houses had formerly been one house, though only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from one to the other without going into the street. The housekeeping, &c. was paid by each partner respectively, but the rent and taxes of both houses were paid by the partners jointly. The prisoner was the servant of T. S. and it was in his house that the burglary was committed. Upon these facts it was objected, that though the two houses were the joint property of both partners, yet they were not the separate mansion of each; and therefore the burglary ought to have been laid as committed in the house of T. S. only; and the Court conceived the objection to be well founded, and directed the jury to acquit the prisoner of the capital part of the charge. See 1 Geo. 4. c. 102; 56 Geo. 3. c. 73.

2. PARMENTER'S CASE. Jan. Sess. 1796. 1 Leach. C. L. 537.

And the same rule applies to nobleman's houses; 1 Hale P. C. 656; East. P. C. 500.

This was an indictment for stealing in the dwelling-house of James Moreland. It appeared that Moreland and one Gutteridge were co-partners; that Moreland was the lessee of the whole premises, and paid all the rent and taxes for the same; that Gutteridge had an apartment in the house, and allowed Moreland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended, that this gave to Gutteridge a joint possession of the shop and warehouses, and that it should have been so laid in the indictment, and on this objection the point was saved; but the judges held the indictment good.

3. *Rex v. Stock*. E. T. 1809. 2 Leach. C. L. 1015. S. C. 2 Taunt. 339.

After the prisoners were found guilty on an indictment for burglary and sentence of death passed, the judge who tried them not being satisfied that the house where the offence had been committed could be deemed the house of the prosecutors, respited their execution in order that the opinion of the judges might be taken on the following circumstances—The prosecutors were co-partners at Whitehaven, both as bankers and brewers. The ground floor of the house was used by the partners in both these concerns; it consisted of three rooms, to which rooms there was only one entrance, by a door from the street. This was the door which the prisoners broke open, and by that means got access to the property, which they took and carried away. This outer door opened into one of three rooms, and in this room the accounts of the brewery concern were separately carried on; from this particular room there was a door which immediately opened into another of the said three rooms, and in this inner room the concerns of the banking business were transacted. This room was also the place where the cash, notes, and other property, belonging to the banking concern, were kept, and which were locked up at night in an iron chest that stood in the room. This room, so appropriated to the banking business, communicated in the same manner with a further room, which was used as the private room of the partners in both concerns, to the outer door of the street there were two locks, one large and the other small. A particular clerk had the custody of the large key, and two other clerks had each a key of the smaller size. No person slept in any of these three lower rooms; but when the street door was locked at night, the clerk who kept the large key left it, on his quitting the offices, in the care of the persons who inhabited the upper rooms of the house, and called for it again in the morning when he returned to the offices. The upper rooms in the house were inhabited by one John Stephenson, who was the cooper employed by the prosecutors in their brewing concern; he was paid half a guinea a week, and had firing and lodging for himself and family; but the contract, as to the lodging, was not, in general terms, that he should be provided with lodging, but that he should be permitted to have the upper rooms for the accommodation of him and his family. There was a separate entrance from the street to that part of the house which Stephenson thus inhabited, and in these upper rooms the prosecutors kept some papers of no consequence. There was no communication between these upper rooms and the under rooms where the business was carried on, except by a trap door, and a ladder from one of the upper into one of the lower rooms; but neither the trap door nor the ladder had ever been used, for any purpose, previous to the robbery, although it might have been used as a way into the lower apartments, for it never had been locked, or in any way fastened, and the key of it was left in Stephenson's custody. It was, however, after the robbery, constantly used as a way, or entrance, into the lower rooms, for the purpose of bolting the street door on the inside, for greater security. In these upper rooms of the house there were six windows, for which windows Stephenson was assessed as occupier, but the rate was paid by his masters. The windows in the lower rooms were not rated to the window tax, these rooms being considered by the assessors as uninhabited. Lord Ellenborough C. J. This man, Stephenson, certainly could not have maintained trespass against his employers if they had entered these rooms without his consent.

the one to the other.
And a contribution by one of two partners of a proportion of the rent and taxes for premises used in the partnership concern, does not give him such a joint possession as to make it necessary in every case to state them as the dwelling-house of both partners.
[758]
And though the servant of a banker be suffered to sleep in a room over the shop, and his salary is diminished on that account, and he has a separate outer door leading to his apartments, the house must be deemed the dwelling of the firm, even though none of the partners sleep therein, there being no actual demise to the servant.

Does a gentleman, who assigns to his coachman the rooms over his stables, thereby make him a tenant? The act of the assessors, whether right or wrong, in assessing Stephenson for the windows of these upper rooms, can make no difference in this case; nor is it material which of the two trades the prosecutors carried on. Stephenson was servant for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap door was left with Stephenson, and the door was never fastened; and it can make no difference whether the communication between the upper and the lower rooms through a trap door, or by a common staircase. The judges took time to advise upon the case; but no opinion was ever publicly given. But the prisoners were afterwards executed.

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13. *Of Partnerships.*

REX v. CLAYBURN, Lent Ass. 1818. Old Bailey. Cited 1 Barn. J. 399; S. C. 1 R. & R. C. C. 350.

Breaking open a goose house which forms part of the barn dary of an inclosed stable yard, is burglary.

Richard Clayburn and William Dunning were convicted of burglary. The place into which they broke was a goose-house in the prosecutor's yard, and opposite his house. The yard has a barn all along the north side; a wall, 7 1-2 feet high, on the south; a stable, goose-house, and a weaver's shop on the east; and the house, with 7 1-2 feet wall on the west. In the south wall is a gate leading into an adjoining lane, and the stable and weaver's shop have doors opening backward, as well as doors opening into the yard. Bayley, J. doubting whether this goose-house could, under these circumstances, be deemed parcel of the dwelling-house, stated the case for the consideration of the judges, who held the conviction right, and the prisoners have been transported for 14 years.

20. *Of shops.*

Burglary may be committed in a shop adjoining to a dwelling house, let with some of the rooms, if under the same roof, though there be no internal communication.*

REX v. GIBSON AND OTHERS. Lent Ass. 1785. Kingston. 1 Leach. C. L. 357; S. C. 2 East. P. C. 508.

A case reserved on an indictment for burglary disclosed these facts: That A. B. was an owner of a house in which he resided himself, and to which there was a shop adjoining. There was no internal communication between the house and shop; no person slept in the shop, and the only door to the shop was in the court-yard, before the house and shop. The court-yard being inclosed by a brick wall, A. B. let the shop, together with some apartments in the house, to C. D., from year to year. In the wall inclosing the house and shop there was a gate, which served as a communication to both house and shop. The prisoners having committed the burglary in the shop, it was objected by the prisoners' counsel, that the shop could not be considered as the dwelling-house of A. B. as laid in the indictment. In consequence of this objection the judgment was respited; but the judges were of opinion, that the indictment was well laid in describing the shop to be the dwelling-house of A. B., who inhabited in one part; and that the shop, being left with a part of the house inhabited by C. D., was still to be deemed part of the dwelling-house of A. B. within the same building, under the same roof, and having only one door of communication.

21. *Of tilted carts.*

It is not burglary to uncover a tilted waggon. 1 Hale. P. C. 557; 1 Hawk. P. C. c. 38. s. 35.

22. *Of warehouses.*

[760]

The mere fact of a porter lying in a warehouse for the purpose of watching goods does not make it a dwelling-house; 2 East. P. C. 497.

(B) OF OUT-HOUSES HELD UNDER A DISTINCT TITLE FROM THE DWELLING-HOUSE.

From 1 Hale. P. C. 559. it might be inferred, that no out-house holden under a distinct title from the dwelling-house, could be the subject of burglary. But, with reference to what is there stated, it has been said, 2 East. P. C.

* But it has been said, that to break and enter a shop not parcel of the mansion-house in which the shopkeeper never lodges, but only works or trades in the day-time, is not burglary; 1 Hale. P. C. 557.

494. that the circumstance of an out-building being enjoyed by the occupier under a different title from the dwelling-house, seems a very unsatisfactory reason of itself for excluding it from the same protection, if it be within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and, under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law.

IV. RELATIVE TO THE FELONIOUS INTENTION OF THE PRISONER.

1. DOBBS'S CASE. Sum. Ass. 1770. 2 East. P. C. 511.

J. Dobbs was indicted for burglary for breaking and entering the stable of J. Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B. there being. It appeared that the gelding was to have run for 40 guineas, and that the prisoner cut the sinews of his fore leg to prevent his running, in consequence of which he died. Parker, C. J. ordered him to be acquitted, for his intention was not to commit a felony by killing and destroying the horse, but a trespass only to prevent his running; and, therefore, no burglary. But the prisoner was again indicted for killing the horse, and capitally convicted.

2. Rex v. DINGLEY. Easter Sess. 1687. Cited BASELEY'S CASE. 2 Leach. C. L. 840; S. C. Show. 53.

On a special verdict it appeared the prisoner had been a servant, or journeyman, to one John Fuller, and was employed to sell goods, and receive money, for his masters's use. In the course of his trade he sold a large parcel of goods, received 160 guineas for them from the purchaser, deposited ten of them in a private place in the chamber where he slept; and on his being discharged from his service, took away with him the remaining 150 guineas; but he had not put any of the money into his master's till, or in any way given it into his possession; before this embezzlement was discovered, he suddenly decamped from his master's service, leaving his trunk, containing some of his clothes and the ten guineas so secreted behind him; but he afterwards, in the night-time, broke open his master's house, and took away with him the 10 guineas which he had laid privately in his bed-chamber; and this was held to be no burglary, because the taking of the money was no felony; for although it was the master's money in right, it was the servant's in possession, and the first original act no felony. See post, tit, Embezzlement.

3. Rex v. KNIGHT. 1782. 2 East. P. C. 510.

The prisoners were indicted for a burglary in the dwelling-house, the intent being laid to steal the goods of Leonard Hawkins. It appeared that Hawkins, who was an Excise officer, had seized some bags of tea in a shop, entered in the name of Smith, as being there without a legal permit, and had removed them to Mary Snelling's where he lodged. The prisoners, and many other persons, broke open Mary Snelling's house in the night, with intent to take this tea. It was not proved that Smith was in company with them; but the witness said, that they supposed the tea to belong to Smith, and supposed that the fact was committed either in company with him, or by his procurement. The jury being directed to find, as a fact, with what intent the prisoners broke and entered the house, found that they intended to take the goods on behalf of Smith; and, upon the point being reserved, all the judges were of opinion, that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavoring to get back Smith's goods, still there was no intention to steal. But if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., which is felony by the 19 Geo. 2. c. 34. some of the judges thought that it would have been burglary: but even in that case, it was agreed; that evidence must be

* For a breaking and entry, though both nocturnal and violent, will not be esteemed burglary, unless the party intended at the time to commit a felony; 2 Leach. C. L. 717.

† Even though it is possible that death might ensue, there being no original felonious intention; 3 Inst. 65; 1 Hale. P. C. 561.

they were taken, an indictment for burglary with intent to steal was holden not to be supported.

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given, on the part of the prosecutor, to show that the goods were uncustomed in order to throw the proof upon the prisoners that the duty was paid: but being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose.

V. RELATIVE TO THE LIABILITY OF AIDERS AND ABETTERS.

If several persons come in the night to commit a burglary, and one of them break and enter, the rest standing to watch at a distance, this will be burglary in all, and they will be all deemed *principals*; 1 Hale. P. C. 665.

VI. RELATIVE TO THE INDICTMENT.

(A) OF THE FORM.

(a) *Of the particular words necessary to describe the offence.*

The words *broke and entered, burglariously and feloniously*, must be inserted in the indictment; 1 Hale. P. C. 550; 4 Co. 39. 40.

See *Precedents*, Peterhoff's Index, Crim. div. 20.

(b) *Statement of the breaking; see ante, 744.*

The indictment must state the *entering* to have taken place in the night; 1 Hale. P. C. 549.

(d) *Statement of the hour at which the offence was committed.*

WADDINGTON'S CASE. Lent. Ass. 1771. 2 East. P. C. 513.

The indictment must state the hour about which the offence was committed.

This indictment for burglary alleged the fact to have been committed in the night, but without expressing about what hour it was done. Gould, J. held the indictment insufficient, and directed the prisoner to be found guilty of a simple felony only; and said, that according to the old doctrine a burglary might be committed at any time between sun setting and sun rising; but that the rule now established is, that it cannot be committed during the *crepusculum*; that therefore it is necessary to specify the *hour*, in order that the fact may appear upon the face of the indictment to be done between the twilight of the evening and that of the morning.

(e) *Statement of the place where committed; see ante.*

The indictment must state the offence to have been committed in a *dwelling-house*; therefore if it be stated as in a *house* generally, it will be defective; 1 Hale. P. C. 550. Where a church is broken into, it seems proper to describe it as the church of the parish to which it belongs, 1 Hale. P. C. 556. And where an out-house or stable adjoining the mansion is broken open it must be laid generally as part of the dwelling-house; 1 Leach. C. L. 144; 2 East. P. C. 512. The local situation must also correspond with the real fact.

[763] (f) *Statement of the ownership; vide div. Place in which the Offence may be committed, ante, p. 745.*

1. *REX v. WHITE*. Feb. Sess. 1783. Old Bailey. 1 Leach. C. L. 252; S. C. 2 East. P. C. 513. S. P. *WOODWARD'S CASE*. Old Bailey. 1785. 1 Leach. C. L. 253. n.

An indictment for burglary to a dwelling house:

This indictment laid the burglary to have been committed in the dwelling-house of J. S.; and it appearing that it was not the house of J. S. the judges held the indictment could not be supported, it being essential to state in the indictment the name of the person in whose house the offences were committed.

2. *REX v. JENKS*. June Sess. 1796. Old Bailey. 2 Leach. C. L. 774; S. C. 2 East. P. C. 514.

In stealing goods, must accurately state the name of the owner.

An indictment for burglariously breaking and entering the dwelling-house of A. with intent to steal the goods of B., no person of that name having any goods in the house, it being in fact a mistake in the name. It was held bad by the judges, because an accurate description was necessary to show to whom the property belonged.

(g) *Statement of the intention to commit a felony.*

The indictment cannot be sustained unless there be an averment of a felonious intention, or the actual commission of a substantive felony; 1 Hale. P.

* As well as the day and year:

C. 559; 2 Leach. C. L. 1717. And the intent must be correctly stated; for if it be charged that the defendant intended to commit one species of felony, and it is proved that he designed another, the indictment will not be sustainable; 1 Hale. P. C. 561; but if a felony has been actually committed, an averment of the intent only will not be vicious; 1 Hale. P. C. 560; in general, where any doubt exists as to what specific felony was designed, the intention should be laid differently in distinct counts, in order to correspond with the evidence; 2 East. P. C. 515.

(B) OF THE DIFFERENT OFFENCES WHICH MAY BE LAID IN THE SAME INDICTMENT.

The same indictment may charge a burglarious entry with intent to steal—an actual stealing—and a capital felony within 5 & 6 Edw. 6. c. 9. for stealing in a dwelling-house to the value of 40s. the owner, or some of his family, being therein waking or sleeping; Hale. P. C. 560. So that the defendant may be convicted of burglary with actual stealing—of burglary with intent to steal—of capital felony under the statute, or—of a simple larceny, according to the evidence. Such an indictment does not need a conclusion contrary to the statute, as the three capital offences are not created, but only deprived of clergy, by legislative provision. When the indictment states a burglarious entry, and an actual felony afterwards, it contains two charges which may be severed by the verdict—the burglary and the felony; and if the former should not be proved, the defendant may still be found guilty of the latter.

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VII. RELATIVE TO THE PLEAS.

See *ante*, vol. ii. *Auterfois acquit*, plea of, 737.

VIII. RELATIVE TO THE EVIDENCE.

(A) WHERE TWO OFFENCES ARE CHARGED IN THE SAME INDICTMENT.

REX V. VANDERCOMBE AND ANOTHER. Jan. Sess. 1796. Old Bailey. 2 Leach. C. L. 708; S. C. 1 East. P. C. 519.

Upon an indictment for burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed; it was proposed to give evidence of a larceny by the prisoners of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence, observing, that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might, unquestionably, be modified, by showing that the prisoners stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an antecedent felony, committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct, and that it might as well be proposed to prove any felony which those prisoners might have committed in that house seven years before.

Under an indictment for burglary and stealing goods, on failing to prove the burglary, the prosecutor cannot be permitted to prove on the same indictment that a larceny was committed at any time antecedent to the time at which the burglary was laid to have been committed.

(B) OF THE BREAKING.

It is essential to prove an *actual* or *constructive breaking*; see *ante*, p. 737; and Fost. 107; 1 And. 114; 1 Hale. P. C. 551; 3 Inst. 64; 1 Hawk. P. C. c. 38.

(C) OF THE ENTRY.

To sustain an indictment for burglary, the prosecutor must prove an entry; see *ante*, 742.

(D) OF THE TIME AT WHICH THE OFFENCE WAS COMMITTED.

Proof that the breaking and entry were made in the night is indispensable. But it is not necessary that the evidence should correspond with the allegation in the indictment, either as to the day or hour; since it will suffice to prove the offence to have been committed during the night; 2 Hale. P. C. 179.

(E) OF THE PLACE WHERE COMMITTED.

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In order to maintain this indictment, the prosecutor must prove that the defendant broke and entered the *dwelling-house* of the person who is described in the indictment to be the owner; 3 Inst. 64; and that it was a place wherein burglary may be committed; see *ante*, p. 745; and if, at the time the burglary was committed, he and his family were absent, his intention to return must be proved; see 1 East. P. C. 499; and *ante*, p. 745.

(F) OF THE OWNERSHIP.

On an indictment for burglary, proof of the *ownership and situation* of the dwelling-house is in all cases requisite. As to who are to be deemed owners, see *ante*, p. 745. *et seq.*

(G) OF THE INTENTION.

The averment in the indictment of the prisoner's intention to commit a felony, must be proved as laid; see 1 Hawk. P. C. c. 38. s. 38; 2 East. P. C. 513; 1 Hale. P. C. 561; 2 Leach. C. L. 840; 2 East. P. C. 510; 2 East. P. C. 514. The best evidence of such intent is proving that the defendant actually committed the felony alleged to have been designed by him; Kel. 30; or any other fact from which the intent may be inferred, is admissible, see *ante*, 760.

If in an indictment for burglary, the actual felony be laid to constitute the burglary, and not the intention to commit a felony, an acquittal of the burglary includes in it the charge of stealing in the dwelling house.*

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Upon an indictment for burglary, the prisoner may be acquitted of the burglary, and found guilty of stealing in the dwelling house to the amount of 40s. under the 12 Ann. c. 7.

IX. RELATIVE TO THE ACQUITTAL.

REX v. COMER. 1744. K. B. 1 Leach. C. L. 36.

This indictment charged the prisoner with having, on a certain day, at about one o'clock in the night, burglariously broken and entered, and stolen certain goods and chattels of the value of 150l. And the jury found as follows; not guilty of the burglary, but guilty of felony in stealing goods to the value of 150l. from the dwelling-house. On this verdict, the question was, whether the prisoner, by virtue of this finding, was not entitled to the benefit of clergy; which point being reserved, the judges were of opinion that he was entitled to the benefit of the statute; for if in an indictment for burglary, the actual felony is laid to constitute the burglary, and not the intention to commit a felony, an acquittal of the burglary by necessary consequence includes in it a charge of stealing in the dwelling-house to the amount of 40s., but not of the simple larceny.

X. RELATIVE TO THE VERDICT.

REX v. WITTHAL AND ANOTHER. Ass. 1772. K. B. 1 Leach. C. L. 88; S. C. 2 East. P. C. 515.

This indictment charged the prisoner with having burglariously broken and entered the dwelling-house of E. F., and with having stolen certain property therein. The evidence did not prove the house-breaking, but supported the theft. The jury accordingly found the prisoner guilty of stealing the goods, and not guilty of the house-breaking; when it was objected that the prisoner was entitled to his benefit of clergy, because the jury had acquitted him of the burglary; and there was no separate count in the indictment, on 12 Anne. c. 7. for the stealing to the amount of 40s.† On a case reserved, the judges were of opinion that the prisoners were ousted of their clergy, for that the indictment contained every charge that was necessary in an indictment upon that statute.

* But a party indicted for burglary, and stealing the goods of a particular person, and acquitted, may afterwards be indicted for the same burglary and stealing the goods of a different person; Vandercomb and another's case, 2 Leach. C. L. 716; S. C. 2 East. P. C. 519. abridged *ante* 764.

† In this case the proper way to take the verdict is, "not guilty of the breaking and entering the dwelling-house in the night, but guilty of stealing, &c. (the articles in question) from the dwelling-house;" 2 East. P. C. 518; S. C. 1 Leach. C. L. 88; though it seems that an entry, "not guilty of the burglary, but guilty of stealing above the value of 40s. in the dwelling-houses" is sufficient to warrant sentence of death being passed on the convict; 2 East. P. C. 518. It has been holden, that where several are joined in the same indictment for burglary and felony, they cannot on the same evidence be found guilty in different degrees, since that circumstance would show that they ought never to have been joined in the same proceedings; 2 Harg. St. Tr. 526; 1 Sid. 171. But in Rex v. Butterworth, 1 R. & R. C. C. 520: upon an indictment for burglary and larceny against

XI. RELATIVE TO THE PUNISHMENT.

Rex v. GADSBY. Lent Ass. 1818. Cited 1 Burn. Just. 407.

Joseph Wilmore was indicted at Northampton Lent Assizes, 1818, before Garrow, B. for a burglary in the dwelling-house of Charles Hill, and burglariously stealing his goods; Joseph Gadsby for feloniously and burglariously receiving the same. Upon the trial, the prisoner Wilmore was acquitted of the burglary; but found guilty of stealing the goods; and Gadsby was found guilty of feloniously receiving. Mr. Denman objected, that Wilmore having been acquitted of the burglary, Gadsby could not be convicted. Upon reference to the judges, they held the conviction right; and the prisoner has been transported for 14 years.

By 10 Geo. 3. c. 48. it is enacted, that every person who shall buy or receive any stolen jewel or jewels, or an stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall in all cases where such jewel or jewels, or gold or silver plate, shall have been feloniously stolen, accompanied with a burglary actually committed in the stealing the same, be triable as well before conviction of the principal felon, whether he be in or out of custody, as after his conviction. And if such person so buying or receiving such jewel or jewels, or gold or silver plate, shall be convicted thereof, he shall be adjudged guilty of felony, and transported for 14 years.

By 23 Geo. 3. c. 88. it is enacted, that if any person or persons shall be apprehended, having upon him, her, or them, any picklock, key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, ware-house, coach-house, stable, or out-house; or shall have upon him, her, or them, any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person or persons; or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard or garden, or area belonging to any house, with intent to steal any goods or chattels, every such person shall be deemed a rogue and vagabond within the 17 Geo. 2 c. 5.

2. *REX V. BROWN.* M. T. 1798. K. B. 8 T. R. 26,

In a case upon this statute 23 Geo. 3. a warrant of commitment was holden defective, because it did not state that the defendant was apprehended with the implements of house-breaking upon him at the time of such apprehension. But Lord Kenyon, C. J. said that he yielded with great reluctance to the objection.

Where the principal has been acquitted of the capital charge, the accessory* may be convicted of receiving the goods, and transported for 14 years. And any person receiving such goods knowing them to have been. [767] stolen at the time the burglary was committed, will be transported for 14 years. And any person carrying implements for house breaking, shall be deemed a rogue and vagabond. But the warrant of commitment for such of fence must state that the implements were on the culprit at the time of his apprehension.

XII. RELATIVE TO THE REWARD GIVEN TO PERSONS APPREHENDING, &c.

By 5 Anne. c. 31. s. 1. 40l, were given to the party apprehending a burglar, and prosecuting him to conviction. And in addition, the 10 W. 3. c. 23. gave him a certificate, or Tyburn ticket, exempting him from all parochial offices; *sed vide* 58 Geo. 3. c. 70. s. 2; C. C. C. 10.

Burial. See *tits. Coroner; Dead Bodies; Executor and Administrator.*

(A) OF THE PERSONS ENTITLED TO CHRISTIAN BURIAL, p. 768.

(B) ——— PLACE OF INTERMENT, p. 769.

(C) MODE OF BURIAL.

(a) Of being buried in woolen, p. 769. (b) — iron coffins, p. 769.

(D) OF THE BURIAL OF DEAD BODIES CAST ASHORE FROM THE SEA, p. 770.

(E) ——— DUTY OF THE MINISTER, p. 773.

(F) ——— FEES FOR BURIAL, p. 773.

(G) ——— REMOVAL OF A CORPSE ONCE BURIED, p. 776.

two, it was holden that one might be found guilty of the burglary and larceny, and the other of the larceny only.

† By the 18 Eliz. c. 7. and 3 W. c. 9. benefit of clergy is taken away in cases of burglary, both from the principal and the accessory *before*; but in all cases of burglary accessories *after* the fact are entitled to their clergy; 2 Hale. P. C. 364; 2 Hawk. P. C. c. 33. s. 105. 106. By the 5 Ann. c. 31. s. 5. any person who shall receive, harbour, or conceal any burglars, knowing them to be so, shall be taken and received as accessory to the said felony.

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The interment of persons found *felo de se*, to be private in burial grounds, within 24 hours after the finding of the inquisition, and between the hours of nine and twelve at night, but no rites of christian burial to be performed—

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A custom to bury relations as near as possible to their ancestors, is bad.

(A) OF THE PERSONS ENTITLED TO CHRISTIAN BURIAL.

By the 4 Geo. 4. c. 52., after reciting the expediency of amending the laws relating to the interment of the remains of persons, against whom a finding of *felo de se* shall have been had, it is enacted, 1st, That from the passing of the act, no coroner, or other officer having authority to hold inquests, shall issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had, in any public highway; but shall give directions for the private interment of such remains. without any stake being driven through the body of such person, in the churchyard or other burial ground of the parish or place in which such remains might by the laws or custom of England be interred, if the verdict of *felo de se* had not been found; such interment to be made within 24 hours from the finding of the inquisition, and to take place between nine and twelve at night.

2d, Provided nevertheless, that nothing herein contained shall authorise the performing of any of the rites of Christian burial on the interment of such remains; nor be taken to alter the laws or usages relating to the burial of such persons, except so far as relates to the interment of such remains in such churchyard or burial ground, at such time and manner aforesaid.

(B) OF THE PLACE OF INTERMENT.†

FRYER v. JOHNSON. M. T. 1755 C. P. 2 Wils. 28.

Action on the case against the parson of the parish, setting out that there had been a custom in the parish, time out of mind, that every parishioner had

*In 1745, a remarkable case occurred at Carlisle, where some of the prisoners concerned in the rebellion died subsequent to their attainder and before execution; the question was, whether they should be admitted to christian burial? And the Lord Bishop of the diocese requested the opinion of a learned gentleman, who made the following remarks for his lordship's consideration: It is certain, that *after* execution the bodies, being at the king's disposal, are for the public example, and for the greater terror unto others, never admitted to christian burial; and this seems to have been the law of the church of England from two ancient canons; by the former of which it is ordained as follows. Concerning those who by any fault inflict death upon themselves, let there be no commemoration of them in the oblation, as likewise for them who are punished for their crimes, nor shall their corpses be carried unto the grave with psalms. By the latter,—if any shall voluntarily kill himself by arms, or by any instigation of the devil, it is not permitted that for such a person any masses be sung, nor shall his body be put into the ground with any singing of a psalm, nor shall he be buried in pure sepulcher. The same shall be done to him, who, for his guilt, ends his life by torments, as a thief, murderer, and betrayer of his lord; *Canones* (see 13 & 14 Car. 2. c. 4. s. 1. 2.) *editi sub Edgardo rege Wilk. Concil.* 1 p. 225. 282; Johns. A. D. 740. No. 96, and A. D. 963, No. 24; 1 Burn. Ecc. Law. 261. The parties were afterwards admitted to christian burial.

But *before* execution the case seems to be different. Mr. Hawkins, 2 P. C. 44th. says, that judgment in high treason is, that the culprit shall be carried back to the place from whence he came, and from thence be drawn to the place of execution, and there be hanged by the neck and cut down alive, and that his entrails be taken out and burnt before his face, and his head cut off, and his body divided into four quarters. and disposed of at the king's pleasure. And Lord Coke says, although judgment be given against a man in case of high treason or felony, yet his body is not forfeited to the king, but until execution it remains his own, and therefore before execution, if he be slain without authority of law, his wife shall have an appeal, for notwithstanding the attainder he remained her husband; 3 Inst. 215. By the rubric confirmed by 13 & 14 Car. 2. c. 4. s. 1 and 2. the office of burial is not to be used for any one who die unbaptized. In Kemp v. Wakes, Arches Dec. 11, 1809, *cor.* Sir John Nicholl, cited 1 Burn. E. L. 265. the baptism of a child by a dissenting minister was holden a sufficient baptism to entitle the child to christian burial by a minister of the church of England. By the 3 Jac. 1. c. 5. if any popish recusant, man or woman, not being excommunicate, shall be buried in any place, other than in the church or church-yard, or not according to the ecclesiastical laws of this realm, the executors or administrators of such person buried knowing the same, or the party that caused him to be so buried, shall forfeit 20*l.*; one third to the king, one third to him that shall sue in any of the king's court of record, and one third to the poor of the parish where such person died.

† Every person is entitled to be buried in the church-yard of the parish where he dies, without paying any thing for the breaking of the soil; Degge. P. 1. c. 12. Though ordinarily it seems, a person cannot be buried in the church-yard of another parish than that wherein he died, at least without the consent of the parishioners or churchwardens, whose parochial right of burial would be invaded, and perhaps, also, the acquiescence of the incumbent whose soil is broken. Thus in the case of the church-warden's of Harrow on

a right to bury his dead relations in the church-yard, as near to their ancestors as possible; and that the defendant refused to permit the plaintiff to bury a relation as near as possible to his ancestor. After a verdict, this was holden to be a bad custom.

(C) OF THE MODE OF BURIAL.

(a) *Of being buried in woollen.*

Formerly, for the encouragement of the woollen manufacture, a compulsory use of woollen shrouds for the dead was thought expedient, and was enforced by the statutes 30 Car. 2. c. 3. and 32 Car. 2. c. 1. But now, by the 54 Geo. 3. c. 108. these acts are repealed.

(b) *Of being buried in iron coffins.*

REX v. COLERIDGE. T. T. 1819. K. B. 2 H. & A. 806; S. C. 1 Chit. Rep. 588. The mode of burial being a matter purely for the ecclesiastical court, the Court of K. B. refused to grant a *mandamus* for purely ecclesiastical cognizance; and they observed, it was well known, that the burial in such cases the temporal Courts would not interfere; and upon the latter [770] point they made the following remarks; It may be admitted, that the right of a body in a parish church-yard in an unusual way, for instance, in an iron coffin, is a common law right, but the mode of burial is a subject of ecclesiastical cognizance alone. If a clergyman should absolutely refuse to bury the body of a dead person brought for interment, in the usual way, we are by no means prepared to say that this court would not grant a *mandamus* to compel him to inter the body; but in so doing we should be acting in aid of the Ecclesiastical Court. Here, however, there has been no absolute refusal to bury, but only to bury in a particular mode. Let the rule be therefore discharged with costs. See Willes. 536; 5 T. R. 364; 1 Burn's Eccl. Law, tit. Burial, edited by Mr. Tyrwhitt; 1 Salk. 334; Palm. 51; 8 Mod. 28; 2 T. R. 484; 6 Taunt. 281.

(D) OF THE BURIAL OF DEAD BODIES CAST ASHORE FROM THE SEA.

By statute 48 Geo. 3. c. 75. after reciting, that whereas no provision hath been made by law for providing suitable interment in church-yards, or parochial burying grounds, for dead human bodies cast on shore from the sea, by wreck or otherwise, in England, and that it was expedient that provision should be made for the decent interment of such bodies, it is enacted, that the churchwardens and overseers of the poor for the time being, of the respective parishes throughout England, in which any dead human body shall be found cast on shore from the sea, by wreck or otherwise, shall, and they are hereby required, upon notice to them given, that any such body is cast on shore by the sea, and is lying within the bounds of the parish for which they shall be churchwardens or overseers of the poor, to cause the same to be forthwith removed to some convenient place, and with all convenient speed to cause such body or bodies to be decently interred in the church-yard or burial-ground of such parish, so that the expences attending on such burial do not exceed the sum which at that time is allowed, in such parish, for the burial of any person the Hill, 1740, cited 1 Burn. E. L. 258. it is said, that upon a process against them for suffering strangers to be buried in their church-yard, and there appearing and confessing the charge, they were admonished by the ecclesiastical judge not to suffer the same for the future. But where a parishioner dies on his journey, or otherwise out of the parish, it is said the rule might be different, as it seems to be, where there is a family vault or burying-place in the church, or chancel, or aisle; 1 Hagg. 17. No person can be buried in the church, or in any part of it, without the consent of the incumbent; and this privilege is confined to the person only, exclusive of the bishop; Cro. Jac. 367; Gibs. 453; Wats. c. 39, p. 887.

† Lord Stowell afterwards directed that such coffins should be received in the parish, receiving an increased rate for the longer occupation of the ground; 2 Hagg. 333.

or persons buried at the expense of such parish; provided, that in case any such body shall be cast on shore from the sea in any extra-parochial place, where there is no churchwarden or churchwardens, overseer or overseers, of the poor, then, and, in every such case, the constable or headborough of such place shall, on notice being given to him that such body is lying in such extra-parochial place, forthwith cause such body to be removed to some convenient

place, and with all convenient speed cause the same to be buried in such and the like manner as the churchwardens and overseers within England are hereby required to bury such body or bodies. Sect. 2. Every minister, parish clerk, and sexton of such respective parishes, shall perform their several and respective duties in such and the like manner as is customary in other funerals, and shall admit of such body being interred in such church-yards or burial-

grounds, without any improper loss of time, receiving for the same, by way of compensation, such and the like sums as in cases of burials made at the expense of such parishes. Sect. 3. In case any person shall find any such body cast on shore from the sea, by wreck or otherwise, and shall, within six hours thereafter, give notice thereof to some one of the churchwardens or overseers of the parish, for the time being, in which such body or bodies shall be found, or to the constable or headborough for the time being, in case such body shall be found in any extra-parochial place, or cause such notice to be left at his or their last or usual place or places of abode, then, and in every such case, such person or persons shall receive the sum of 5s. for his, her, or their trouble, such sum to be forthwith paid to the person or persons first giving such notice only; but, nevertheless, that no greater sum than 5s. shall be paid for any one notice, although there may be a greater number of such bodies than one.

Sect. 4. In case any person shall find any such body cast on shore, and shall not, within six hours thereafter, give notice to some one of the churchwardens or overseers of the parish in which such body shall be found, or to the constable or headborough in any extra-parochial place, or cause such notice to be left at his or their last or usual place or places of abode, such person or persons shall, for every such offence, forfeit the sum of 5l

Sect. 5. All necessary and proper payments, costs, charges, and expenses, which shall be made or incurred in or about the execution of this act, shall be made and paid by the churchwarden or churchwardens, overseer or overseers, constable or headborough, for the time being, of such respective parishes and places.

Sect. 6. And for reimbursing him or them all such payments, costs, charges, and expenses, it shall be lawful for any one justice of the peace for the county or place, within England, in which any such body shall have been so removed and buried as aforesaid, by any writing under his hand, to order and direct the treasurer for such county to pay such sum or sums of money to such churchwarden, overseer, constable, or headborough, for his or their costs and expenses in or about the execution of this act, 'after the same shall have been verified on oath,) as to the said justices shall seem reasonable and necessary; and such treasurer shall, and he is hereby required forthwith to pay the sum so ordered to be paid, to the person or persons empowered to receive the same, and such treasurer shall be allowed the same in his accounts.

Sect. 7. In case any such churchwarden, overseer, constable, or headborough, shall refuse or neglect to remove, or cause to be removed, such body or bodies from the sea-shore, to some convenient place, prior to the interment thereof, for the space of 12 hours after such notice given, or left in writing at his usual place of abode, or shall neglect or refuse to perform the several other duties required of him and them by this act, then, and in every such case,

* An order purporting to be the order of a magistrate on the treasurer of a county, to reimburse the expences of burying a dead body cast on shore, was held (on a case reserved) to be a forgery, though there was no such magistrate, and though the order did not state the person to whom the money was directed to be a parish officer, or that the expences incurred were reasonable and necessary; *Rex v Froud*, tried *Launceston spring assizes*, 1819, and argued in the Exchequer Chamber, June 26, 1819, 1 *Brod. & Bing.* 300. abridged *post*, Forgery.

And the minister of the parish to perform the funeral service, &c.

Persons finding dead bodies are to give no [771] tice to parish officers and are entitled to a reward.

And if they do not give such notice they are liable to a penalty.

The churchwardens to pay the expences incurred by such persons.

And to be reimbursed by treasurer of the county.*

If the churchwardens neglect to inter such person, they are subject to a penalty.

every such churchwarden or overseer, constable or headborough, shall forfeit the sum of 5l.

Sect. 8. All penalties and forfeitures under this act, if not paid on conviction, shall be levied and recovered by distress and sale of the offender, by warrant under the hand and seal of any justice of the county or place where the offence shall happen, which warrant the justice is hereby empowered to grant on the confession of the party, or upon the evidence of any credible witness upon oath; and the surplus arising by such distress and sale shall be returned, on demand, to the owner of such goods and chattels, after deducting the costs and charges of making, keeping, and selling the distress; and such forfeitures, when recovered, shall be paid to the informer; and if sufficient distress shall not be found, or such penalties and forfeitures shall not be paid forthwith, such justice is hereby authorised and required by warrant, under his hand and seal, to cause the said offender to be committed to the common gaol and house of correction of such county or place, there to remain without bail or mainprize, for any time not exceeding two calendar months, nor less than 14 days, unless such penalties and forfeitures, and all reasonable charges attending the recovery thereof, shall be sooner fully paid and satisfied.

Recoverable by distress, [772]

Sect. 10. If any person shall think himself aggrieved by any judgment, or by any matter done in pursuance of this act, such person or persons may appeal to the justices at the first general or quarter sessions of the peace, to be holden for the county or place (within which the matter of appeal shall arise,) next after the expiration of one calendar month from the time such matter of appeal shall have arisen, the person appealing having first given ten days' notice, at least, of his or their intention to bring such appeal, and of the matter thereof, to the person or persons so appealed against; and forthwith, after such notice, entering into a recognizance before some justice of the peace for such county or place, with sufficient sureties, conditioned to try such appeal, and abide the order and award of the said court thereon; and the said justices at such sessions, upon the proof of such notice and recognizance having been given and entered into, are hereby authorised to hear and determine the matter of such appeal in a summary way, and to make such determination therein, and to award such costs to either of the parties, or otherwise, as they shall judge proper; and the said justices may, if they see cause, mitigate any fine, penalty, or forfeiture, and may also order such further satisfaction to be made to the party injured as they shall judge reasonable; and all such determinations of the said justices shall be final, binding and conclusive upon all parties, to all intents and purposes whatsoever.

Subject to an appeal to the quarter sessions.

Sect. 11. Where any distress shall be made for any sum of money, to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant of distress, or other proceedings relating thereto, nor shall the party distrained be deemed a trespasser *ab initio*, on account of any irregularity that shall be afterwards done by the party so distraining; but the person aggrieved by such irregularity shall and may recover full satisfaction for the special damage in action upon the case.

Proceedings are not to be quashed for want of form.

Sect. 12. All penalties and expenses attendant thereon, which shall be incurred under the provisions of this act, shall be paid and borne by the person or persons incurring the same, and that the parish or place wherein such person or persons ought to have acted in the duties prescribed by this act, shall be wholly exempted therefrom.

Penalties to be paid by persons incurring the same. [773]

* By sect. 13. After reciting, that whereas in cases of dead wrecks, wherein no living person is found, or owner known, the lords of the manor on which any such dead body or dead bodies may be washed in, and who are entitled to wreck there, have usually paid a small fee for placing such body or bodies in the ground, in the state in which the same have been found, and such payments have been adduced and admitted as proof, on trials at common law, of the right of such lords of manors to wreck in such manors, it is enacted, that

Lords of manors are to bury dead bodies when they are cast on their manor.

And the expense of the removal of such bodies are to be regulated by the quarter sessions.

An information lies against a parson for refusing to bury a parishioner.*

No fees for burial are payable on [774] common right, but in some parishes they are regulated by statute, and in others by custom.†

in all such cases it shall be lawful for every lord of any manor, throughout England, to pay, or cause to be paid, to the churchwarden, overseer, constable, or headborough, of such respective parishes and places as aforesaid, such and the like sums as he or they was or were heretofore accustomed to pay for the placing any such body or bodies into the ground as aforesaid; such sums to go in part payment and discharge of the costs and expenses to be incurred in or about the execution of this act, and credit to be given for the same by such overseers, churchwardens, constable or headborough, in their accounts with the county to which such accounts shall be submitted.

Sect. 14. And for defraying the expenses of the removal and burial of such body or bodies as aforesaid, and all other expenses necessary for the execution of this act, it is enacted, that the justices at the general or quarter sessions may cause such sums of money as shall be necessary for all or any of the purposes aforesaid, to be raised in the same manner as rates are directed to be raised by stat. of 12 Geo. 2. c. 29.

(E) OF THE DUTY OF THE MINISTER.

REX v. TAILOR. 1720. K. B. Cited Willes. 538. n.

It was holden in this case that an information might be obtained against a parson for opposing the burial of a parishioner in the churchyard.

(F) OF THE FEES FOR BURIAL.

1. ANDREWS v. CAWTHORNE. H. T. 1745. C. P. Willes. 536. S. P. THE BISHOP OF ST. DAVID'S v. LUCY. E. T. 1699. K. B. 1 Lord Raym. 447: S. C. 12 Mod. 227.

This was an action of *assumpsit* to recover 5*l.* for money had and received by the defendant to the use of the plaintiff. The defendant having pleaded the general issue, a special verdict was found, stating that as to 4*l.* 16*s.* 8*d.* the defendant did not undertake, &c.; and as to the sum of 3*s.* 4*d.* residue of the sum of 5*l.* they said that the defendant received it by the order of Edward Vernon, rector of the parish and parish church of St. George's, Bloomsbury, in the county of Middlesex, as a burial fee claimed by Dr. Vernon, for the burial of A. Micklebrough in the new cemetery or churchyard assigned and belonging to the parish of St. George's, Bloomsbury. That the said cemetery, before the time that A. Micklebrough was buried there, had by virtue of certain acts of parliament; 9 Anne, c. 22; 10 Anne. c. 11; 1 Geo. s. 1. c. 23; 4 Geo. 1. c. 14; and 3 Geo. 2. c. 19; been purchased and assigned as a cemetery for the parish of St. George's, Bloomsbury, and had been duly consecrated as by the acts is directed. That A. Micklebrough was a parishioner of the parish of St. George's, Bloomsbury, at the time of her death, and the plaintiff, Andrews, her executor; and that at the time of taking the fee of 3*s.* 4*d.* Dr. Vernon was, and still is, rector of the said parish. That the whole of the parish of St. George's, Bloomsbury (except the said, cemetery,) was formerly part of the parish of St. Giles's in the Fields, and was duly divided and separated therefrom by the commissioners, in pursuance of the directions of the said several acts of parliament, and the instrument for the appointment of the said parish of St. George's, Bloomsbury, was duly enrolled in Chancery as the said acts direct; and that before the burial of the said A. Micklebrough, the parish church of St. George's, Bloomsbury, was duly consecrated. That there is an immemorial custom within the parish of St. Giles, for the rector of the

*But not for refusing to read the service over the deceased, because he never was baptised, that being a matter cognizable only in the ecclesiastical court; Sergeant Hills MS. cited 1 Burn. E. L. 257.

And by 68th canon, no minister shall refuse or delay to bury any corpse that is brought to the church or church-yard (convenient warning being given to him thereof before) in such manner and form as is prescribed in the book of Common Prayer. And if he shall refuse so to do, except the party deceased were denounced *excommunicatæ*, *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry by the space of three months.

† And they generally belong to the minister of the parish, unless there be a custom or usage to the contrary; 1 Burn. E. L. 269. 270.

parish of St. Giles to receive a fee of 3s. 4d. for the burial of every parishioner buried in the cemetery of the said parish, or in any other of the burial places of the said parish, and a larger fee for every parishioner buried within the church of the said parish. That the new cemetery, in which A. Mickleborough was buried, never was any part of the ancient burying places belonging to the parish of St. Giles, but was part of the parish of St. Pancras, and lies in the fields upwards of a mile distant from the church and rectory house of St. George's Bloomsbury. And then the jury made the general conclusion, and prayed the advice of the Court, &c. After two arguments, the opinion of the Court was given for the plaintiff by Abney, J., in the course of which he stated that no fee was due for burial on common right, but it might be payable by prescription, or immemorial custom.

2. ANON. M. T. 1674. K. B. 1 Vent. 274.

After a libel in the Ecclesiastical Court, by the churchwardens of a particular parish, for 11. 18s. 8d upon a custom to pay such fee for being buried in the body of the church. A prohibition was prayed, suggesting that there was no such custom; the Court intimated that such a custom was good, because the parish is to be at the charge of taking up the church floor; but if the custom be denied, it must be tried at law, and therefore inclined that a prohibition ought to be granted; see Dean of Exeter's case, post, 775; though it was objected that this duty belongs properly to the Ecclesiastical Court, and no remedy for it elsewhere; for so is the case of a *modus decimandi*, which may be demanded in the Spiritual Court; but if the custom be denied, there shall be a prohibition. On the case coming before the Court again a prohibition was granted.

Hence a custom that the churchwardens of a parish are to have the burial fees;

[775] Or that the churchwardens are to take the money for burying in the church or churchyard, and the parson for burials in the chancel, is good.

3. ANON. H. T. 1680. K. B. 2 Show. 184.

It was holden in this case, that the churchwardens have a right to the churchyard, and not to the church, for the parson only has that, although in the neighbourhood of London the churchwardens take money for breaking open the ground in the churches, and the parson only for the chancel. And note by Spelman, it is but of late years that they have buried in churches. See 3 Com. Dig. 657; 2 Roll. Abr. 377; Cro. Jac. 367.

4. DEAN AND CHAPTER OF EXETER'S CASE. H. T. 1706. K. B. 1 Salk. 334.

S. P. ANDERSON V. WALKER. H. T. 1697. K. B. 3 Salk. 86.

Cause was shown against a rule for a prohibition to the Spiritual Court, to stay a suit there for the customary fee of 10l. due to the dean and chapter of Exeter, for burying in the cathedral church; but not allowed; for no fee is due for burial of common right; but where a licence is necessary, the person giving it may stand on his own price; and if there be such a custom, it is triable at common law; 3 Keb. 527. 523. If the custom be not denied, the Spiritual Court shall proceed, for there is no other remedy; but if the custom be denied, a prohibition shall go; burials at common law ought to be in the church-yard, and without fee.

And where a licence is necessary, the person giving it may demand his own fees; and if an alleged custom to charge a certain fee be denied, it is triable at law.

5. LITTLEWOOD V. WILLIAMS. T. T. 1815. C. P. 1 Marsh. 589; S. C. 6 Taunt.

It was proved in this case, that from the year 1727 till the appointment of the defendant as vicar of the parish, a custom had existed, of equally dividing between the churchwardens and the vicar for the time being, the emoluments arising from fees paid for permission to bury strangers in the church-yard belonging to the parish. These fees were accustomed to be received by the sexton, and by him paid over in moieties to the respective parties. The defendant, on his induction to the vicarage, under the impression that the plaintiff could not demand a share of the fees by legal right, declined to concur in the above agreement, and prevailed on the sexton, who still received the fees under the former authority, to pay the whole to him; whereon the present action was instituted by the churchwardens to recover a moiety. The plaintiffs had a verdict, subject to the opinion of the Court; and on a rule nisi for that purpose, the Court said, that as the agreement was untenable, as concerned the present parties, for want of the defendant's assent, it was necessary to consider the legality of the original agreement, in order to ascertain whether

And where an agreement had subsisted between the churchwardens and the vicar of a parish, that on the interment of a stranger in the churchyard

[776] or not the plaintiffs might recover the moiety demanded as money had and received of their agent to their use; and they were of opinion, that unless the parishioners were exposed to inconvenience by the admission of bodies of strangers, the agreement as stated to have existed would be valid. It appears that the defendant concurred in the burial of strangers, and prevailed on the sexton who was agent to the plaintiffs, to pay over to him the proceeds; we therefore think that he received them by construction for the use of the plaintiffs.

6. *HORSFALL V. HANDLEY*. H. T. 1818. C. P. 2 B. Moore. 5; S. C.

8 Taunt. 136.

The plaintiff having purchased a vault in the burial-ground belonging to the chapel of N., had occasion to inter a body therein, when the clerk of the chapel demanded certain dues for breaking the ground; the undertaker acquiesced in the clerk's demand, and charged the plaintiff with the sum so disbursed. The clerk of the chapel paid over the money to the churchwardens, by one of whom, (who received such monies by the custom of the parish,) it was paid to the treasurer of the trustees of the chapel, pursuant to a statute passed for that purpose. On an action being brought against the churchwarden, for money had and received to the plaintiff's use, it was holden, that as the defendant had had no notice not to hand over the money, and had paid it in the discharge of his duty, he ought not to be compelled to pay it again. A rule to set aside a nonsuit was, therefore, refused.

(G) OF THE REMOVAL OF A CORPSE ONCE BURIED.

A corpse once buried cannot be taken up or removed without licence from the ordinary; *Gibs*. 454; except in the case of a violent death when the coroner may take up the body for inspection, if it be interred before he comes to view it.

Burning in the hand. See 19 Geo. 3. c. 74. s. 3 & 4 39 Geo. 3. c. 45; 1 Geo. 4. c. 57. s. 2.

Bushel. See *titls. Weights and Measures; Variance*.

Bust. See *Piracy*.

Butcher.

By the 2 & 3 Ed. 6. c. 15. if any butchers shall conspire not to sell their victuals but at certain prices, every such person shall forfeit for the first offence 10*l.* to the king; and if not paid in six days he shall suffer 20 days' imprisonment, and shall only have bread and water for his sustenance; for the second offence, 20*l.* in like manner or the pillory; (the punishment of the pillory is now abolished except in cases of perjury, &c. by stat. 5 Geo. 3. c. 138.) and for the third offence, 40*l.* or pillory and the loss of an ear, and to be taken as an infamous man, and not to be credited in any matter of judgment. And the sessions or leet may determine the same. By 4 Hen. 7. c. 3. no butchers shall slay any beast within any walled town, except Carlisle and Berwick, on pain of forfeiting for every ox, 12*l.*, every cow and other beast, 8*l.*, half to the king and half to him that will sue. A butcher selling swine's flesh meased, or flesh dead of the murrain, shall for the first offence be grievously amerced; the second time suffer judgment of the pillory; the third be imprisoned and pay a fine; and the fourth forswear the town; Hawk. Stat. vol. i. p. 181; by the 3 Car. c. 1. if any butcher shall kill or sell any victual on the Lord's day, he shall forfeit 6*s.* 8*d.*, one-third to the informer. and two-thirds to the poor, on conviction before one justice on his own view, confession, or oath.

Butter. And see *titl. Custom*.

REX V. BELL. E. T. 1763. K. B. 2 Burr. 1173.

This was a conviction for importing Irish butter from Lisbon into England, contrary to the acts of 18 Car. 2. c. 2; 20 C. 2. c. 7; and 32 C. 2. c. 2.—The butter was exported from Ireland to Lisbon, and from Lisbon re-exported to England, and imported here at Hull; which, it was insisted, did not occasion a forfeiture of the butter, and that the conviction was wrong in making it absolutely forfeited, even though it should be liable to the greater duty and not to the less. On the other hand, in support of the conviction, it was contended that Irish butter, imported from Lisbon, or any other place, is confiscatable,

by 18 C. 2. c. 2; 32 C. 2. c. 2. s. 9; and 20 C. 2. c. 7. s. 3; that all these acts are to be considered as one law; and by them all Irish butter, imported hither from any place whatsoever, is forfeitable, just as much as if it was imported directly and immediately from Ireland. Per Lord Mansfield, C. J. Here is no suspicion of fraud; if there had, it might be a different case. It would not be worth while to go round by Lisbon to evade the act, and to pay 7s. 8d. to avoid paying 4d.; and if it be within the prohibition, it is within the permission.—Conviction quashed.

Butter and Cheese. See 13 & 14 Car. 2. c. 26; 4 W. c. 7; 36 Geo. 3. c. 86. s. 19. 1. 14. 16. & 17; 38 Geo. 3. c. 73.

Buttons.

1. **REX v. JUKES.** E. T. 1800. K. B. 8 T. R. 542.

The defendant was convicted upon the 36 Geo. 3. c. 60. for unlawfully and fraudulently placing for sale upon certain cards and papers, divers dozens of

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* Sect. 1. which enacts, that no person who shall order or apply for any metal buttons from any manufacturer or maker of buttons shall direct the words gilt or plated, or any word, letter, figure, mark, or device, indicating the quality to be printed, cast, stamped, or marked, in or upon any part of such buttons, or any word, letter, figure, mark, or device, whether the same do or do not indicate the quality to be printed, &c. or marked in or upon the under side of such buttons, unless such person do at the same time order such buttons to be gilt with gold, or plated with silver respectively; and no person shall procure or purchase any metal buttons not being so gilt or plated, having the words gilt or plated, or any other word, &c. or device printed, &c. or marked thereon, or any word, &c. printed, &c. on the under side, whether the same do or do not indicate the quality, knowing the same not to be so gilt or plated, as aforesaid, on pain of forfeiting in every such case such buttons, and also 5l. for any quantity not exceeding 12 dozen, and if above, after the rate of 1l. for every 12 dozen. Sect. 2. And no person shall print, cast, stamp, or mark, or cause to be so done, upon any part of any metal button, the words gilt or plated, or any other word, letter, figure, mark, or device, indicating the quality, or on the underside whether the same do or do not indicate the quality, unless such buttons are before *bona fide* plated with silver, or afterwards gilt with gold, or destroyed before sold; and no person shall put or affix upon any such buttons having the words gilt or plated or other words, &c. or device as aforesaid, indicating the quality on any part thereof, or on the underside, whether the same do or do not indicate the quality, any ornament, whatsoever unless these parts not covered thereby be *bona fide* plated or gilt before such ornament be put or affixed thereon. And no person shall put or pack, or cause to be put or packed for sale, upon any card, paper or other substance, or sell or expose to sale, any metal buttons not being gilt or plated as aforesaid, if the words gilt or plated, or any other word, &c. or device as aforesaid, indicating the quality, be printed, &c. or marked thereon, or upon any such card (not being the pattern card,) paper, or other substance; or on the underside of such buttons whether the same do or do not indicate the quality, knowing the same not to be so gilt or plated, on pain of forfeiting in every such case such buttons, and also 5l. for any quantity exceeding one dozen, and not exceeding twelve dozen; and if above twelve dozen, after the rate of 1l. for every twelve dozen. Sect. 3. And no person shall print &c. or mark, or cause so to be done, in or upon any metal button, any word, letter, figure, mark or device, indicating the quality thereof, except the words gilt or plated, or shall pack or cause to be packed for sale, in or upon any card (except the pattern card.) paper, or other substance or parcel, or offer or expose to sale, or cause to be sold or exposed to sale, any metal buttons having any word, &c. or device, indicating the quality thereof, other than the words gilt or plated, printed, &c. or marked thereon, on pain of forfeiting such buttons, together with 5l. for any quantity exceeding one dozen, and not exceeding twelve dozen, and if exceeding twelve dozen, after the rate of 1l. for every twelve dozen. Sect. 4. Provided that nothing herein shall extend to inflict any fine, penalty, or punishment, upon any person who shall print, &c. the words double gilt, in or upon any metal buttons or put, place, or pack for sale, in or upon any card, (except the pattern card,) paper or other parcel, or expose to sale any such buttons having the words double gilt thereon; provided continually from the time of gilding thereof gold shall remain, put and equally spread upon the upper surface of the said buttons, exclusive of the edges, in the proportion of ten grains to such quantity of the said buttons, the upper surfaces of which, exclusive of the edges, shall be equal to the superficies of a circle twelve inches in diameter, or who shall print, &c. the words treble gilt., in or upon any metal buttons, or put upon any card, &c. or expose to sale any metal buttons having the words treble gilt thereon, having fifteen grains to the like quantity of buttons as aforesaid, on the like superficies as aforesaid, any thing hereinbefore said to the contrary notwithstanding. Sect. 5. And if any person shall make out, send, or deliver, for, with, or in relation to, any metal buttons, any list, bill of parcels, or invoice expressing therein any other than the real quality of such buttons, knowing the same, he shall forfeit twenty pounds. Sec. 5. No person shall knowingly intermix,

exposed to sale upon the pattern cards under the 36 Geo. 3. c. 60. metal buttons marked with the words *double gilt* and *triple gilt*, the same not being so gilt within the meaning of the statute; but the conviction did not negative the exception introduced in the clause, that the buttons had not been exposed to sale in this instance upon the pattern cards. Wherefore the Court quashed the conviction.

REX v. JCKES. E. T. 1800. K. B. 8 T. R. 542.

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And state that the defendant knowingly placed them for sale.

A conviction upon the 36 Geo. 3. c. 60. having charged that the defendant did the act *unlawfully and fraudulently contrary to the form of the statute*, without expressing that he did it *knowingly*, it was holden insufficient, and that such defect was not cured by the proviso in the statute, that no conviction for any offence or cause to be intermixed, any metal button or buttons that shall not be *bona fide gilt*, or plated, upon any card (except pattern cards,) paper, or other substance, whereon, or wherein any metal button or buttons so gilt or plated shall be put, nor intermix the same in any other manner, on pain of forfeiting such buttons, and also 5l. for any quantity exceeding one dozen, and not exceeding twelve dozen. if exceeding twelve dozen, 1l for every twelve dozen. Sec. 7. And for the better ascertaining what shall be deemed a gilt, or plated button, no metal buttons shall be deemed gilt buttons, unless continually, from the time of gilding thereof, gold shall remain equally spread upon the upper surface thereof, exclusive of the edges, in the proportion of five grains to a superficies of a circle twelve inches in diameter; and no metal buttons shall be deemed to be plated, unless the superficies of the upper surface thereof be made of a plate of silver fixed upon copper, or a mixture thereof with other metals, previous to the same being rolled into sheets or fillets. Sects. 8, 14, 15, and 16. One justice, where the offence is committed, or the offender resides, may by warrant cause such metal buttons as shall be liable to forfeiture under this act to be seized, and to keep them safe in custody, for the purpose of producing the same in evidence upon any prosecution or action, and when no further necessary, such justices shall order such buttons to be destroyed. And two justices where any offender shall reside, or where any offence shall be committed, may hear and determine the same, who, on information or complaint within three calendar months, shall summon the party accused, and witness on each side, and examine into the facts, and on proof either by confession or oath of one witness, shall give judgment for the pecuniary penalty with costs, to be allowed by such justices, and shall levy the same by distress, and cause sale thereof, if not redeemed within five days inclusive of the day of seizure; half to the informer or person suing, and half to the poor; and for want of sufficient distress, shall commit such offender to goal where the information shall be laid, for any time not exceeding three calendar months, unless such penalty and costs be sooner paid. Sect. 9. If any person shall think himself aggrieved by the judgment of such justices, he may (on giving security with sufficient surety to the amount of such penalty and costs, together with such further costs as shall be awarded in case such judgment be affirmed,) appeal to the next sessions where such conviction shall be made, who may summon and examine witnesses, and hear and finally determine the same, and award costs as they shall think reasonable.

Sect. 10. Provided that the said justices, and also such sessions, may mitigate any such penalty, so as not to reduce the same below one-half, or where such penalties shall be less than 40s. below 20s. Sect. 11 and 12. As to the form of the conviction. And that no such conviction shall be set aside for want of form, or, through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in the conviction be proved to the satisfaction of said court. Sect. 13. Witnesses not appearing, having been duly summoned, without reasonable excuse, to be allowed by such justices, or refusing to be examined on oath, shall forfeit 5l. Sect. 17. Any person may be a witness notwithstanding his being an inhabitant of the parish or place where the offence shall be committed. Sect. 18. And if any person liable to any of the penalties aforesaid shall, before information against him, discover to two justices the person by whose order he did the act which subjected him to such penalty, he shall be entitled to a moiety of the penalty as informer. Sect. 19. Provided also, that if any maker of buttons, who shall have ordered any metal buttons to be gilt, shall before the burnishing thereof appear before two justices, and prove by one witness that he ordered the said buttons to be gilt in the manner required by this act, and delivered gold sufficient for that purpose, or paid or contracted to pay a proper sum in that behalf, and shall afterwards prosecute such gilder or other person to conviction, he shall not be liable to any fine, forfeiture, penalty, or punishment, on account of the said buttons not being gilt with gold, any thing to the contrary notwithstanding. Sect. 20. Provided also, that this act shall not be extended to buttons made of gold, silver, tin, pewter, lead, or mixtures of tin and lead, or iron tinned, or of Bath or white metal, or of any of these metals inlaid with steel, or buttons plated upon shells. Sect. 15. No information shall be exhibited or action brought, unless within three calendar months after the offence committed. Sect. 21. Every suit or action commenced against any person for what he may do in pursuance of this act, shall be commenced within six calendar months; see also 13 & 14 Car. 2. c. 18 s. 2 and 3; 4 W. c. 10 s. 2 and 3; 10 W. c. 2; Anne. c. 6; 4 Geo. c. 7; 7 Geo. st. 1. c. 12.

fence against the act shall be set aside for want of form, or through the mistaking of any fact, circumstance, or otherwise, provided the material facts alledged are proved; for this in effect requires all material facts to be alledged, and *knowledge* is a material circumstance to constitute such an offence. [780]

Buying of Titles.

It is an high offence at common law to buy or sell any doubtful title to lands known to be disputed, with a view that the buyer shall carry on the suit, which the seller does not think it worth his while to prosecute, and on that consideration sells his pretensions at an under rate. It appears not to be a material ingredient, to constitute this offence, whether the title be a good or a bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind ought to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchass the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely maintain against their proper adversary; 1 Hawk. c. 86. s. 1.

By stat. 13 Ed. 1. c. 49. no person of the king's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at the king's pleasure. And by 32 H. 8 c. 9. s. 4. none shall buy any pretended right in any land, unless the seller has been in possession of the same, or of the reversion or remainder thereof; or taken the rents and profits thereof, for one year next before; on pain that the seller shall forfeit the land, and the buyer the value, half to the king, and the other half to him who shall sue within one year for the same. A party in lawful possession may purchase the pretended title of others; 32 H. 8. c. 9. s. 4; and a conveyance made by one who has the uncontested possession, and undisputed absolute propriety of lands, is not within the meaning of this statute; 1 Hawk. c. 86. s. 15. In an action for penalties the offence may be laid in any county at the pleasure of the informer; 31 Eliz. c. 5. s. 4.

Bye Law. See *tit. Corporation; Customs.*

END OF VOL. IV.

